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BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY

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BARRISTERS-AT-LAW.

VOL. LXI.

1842-1844.

3 DRURY & WARREN; 3 QUEEN'S BENCH; 4 MANNING &
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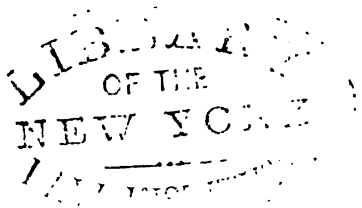
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PREFACE TO VOLUME LXI.

THE nature of a foreclosure suit in relation to Statutes of Limitation is carefully expounded by Sir Edward Sugden in *Wrixon v. Vize*, p. 14.

Roscorla v. Thomas, p. 216, may fairly be called a leading case in the doctrine of consideration. The exact point had been neatly stated as long before as 1585. "If one selleth a horse unto another, and at another day he will warrant him to be sound of limb and member, it is a void warrant, for that such warranty ought to have been made or given at such time as the horse was sold": *Sidenham v. Worlington*, 2 Leo. 224, Finch, Sel. Ca. 2nd ed. 337. Yet in the case last cited it was supposed that an executed consideration which would not support Debt might be sufficient in Assumpsit. When we consider the origin of assumpsit, and the possibilities of confusion arising from an action in assumpsit on a promise "implied by law"—in other words fictitious—being the only way of enforcing obligations *quasi ex contractu*, we need not be surprised at the length of time that was required to settle finally the rule that the promise and consideration of an actual contract must be simultaneous, and to make it clear that the exceptions, real or apparent, would not be extended. Even some equity Judges have fallen into strange errors on this head in cases of much later date.

Boorman v. Brown, p. 287, is instructive on the relation of assumpsit to the older action in tort for misfeasance in a voluntary undertaking. It is sometimes forgotten that the

introduction of *assumpsit* as a special kind of action on the case did not affect the earlier form of action in any way, or prevent it from being used in a proper case even where *assumpsit* was a possible alternative. It will be observed that here the declaration was in tort for negligence in the execution of a duty, though the duty arose from a contract, and the defendant pleaded (among other pleas) not guilty. In the House of Lords the opinion that the declaration might be read as an informal declaration in *assumpsit* found some favour, but it was unnecessary to decide this.

In *M'Laughlin v. Pryor*, p. 455, seemingly a rather hard case on the facts, a man may see the danger of putting oneself in the position of a master by undertaking the specific control of another's servants acting for one's benefit. Such interference may make a man answerable as an employer for the time being, or as having authorized a particular wrongful act.

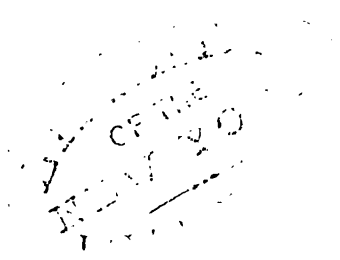
Arnold v. Mayor of Poole, p. 664, is one of a line of authorities on the validity or otherwise of acts done by corporations not under their common seal, which were by no means free from obscurity and conflict until, quite lately, the Court of Appeal went some way towards settling the law in *Lawford v. Billericay Rural District Council* [1903] 1 K. B. 772, 72 L. J. K. B. 554.

Leake v. Loveday, p. 707, is an interesting example of a class of cases which, taken alone, might be misleading. It does not decide that an outstanding title of a third person may generally be set up as a defence in trover, but only that a third person's better right to possess may be shown as against a plaintiff who has never had possession. The rule is the same as against one who formerly had possession without title, but has been lawfully deprived of it, and has no

right to possess at the time of action brought: *Buckley v. Gross* (1863) 3 B. & S. 566, 32 L. J. Q. B. 129. Actual possession, on the other hand, is equivalent to title, in trover as well as in trespass, against a defendant who shows no better right of his own: *Jeffries v. G. W. R. Co.* (1856) 5 E. & B. 802, 25 L. J. Q. B. 107, where the material distinction from the principal case was that the plaintiff had acquired possession; *Bourne v. Fosbrooke* (1865) 18 C. B. N. S. 515, 34 L. J. C. P. 164, where the plaintiff, as noted by Mr. Justice Wright, Pollock & Wright on Possession, 151, was a bailor at will entitled to resume possession, and therefore to bring detinue as well as trover.

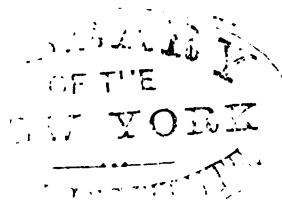
Edsall v. Russell, p. 770, may look obsolete at first sight; but so much of the old rules of pleading is still applicable in substance to actions for defamation that the points decided, or some of them, may still be of practical use.

F. P.



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OF THE
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1842—1844.

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SIR EDWARD BURTENSHAW SUGDEN . .	} <i>Lord Chancellor of Ireland.</i>
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(1) The description of Mr. Justice Erskine as a knight in the earlier volumes of Manning and Granger's Reports was erroneous. As a peer's son he would not have been knighted in the ordinary course; and the lists of the Judicial Committee in Moore's Privy Council Reports, and of the Benchers of Lincoln's Inn in the Law List down to 1863 (confirmed by the description of the Right Hon. Thomas Erskine in a deed of which a copy is before me), show that in fact he was not.—F. P.

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The Revised Reports.

VOL. LXI.

CHANCERY.

BAYDEN *v.* WATSON.

(12 L. J. Ch. 277—279 ; S. C. 7 Jur. 245.)

A., being indebted to two parties on bond, conveyed real estate to one of those parties upon trust to sell, and out of the proceeds and the rents which should be payable before the sale, to pay the bond creditors, and to pay the surplus to A., his executors, administrators, or assigns. The trustees did nothing towards the execution of the trusts, and three years afterwards A. died : Held, that the real estate had been absolutely converted into personalty, and that the surplus was applicable to the payment of A.'s simple contract creditors.

1842.
Jan. 22, 24.
Dec. 20, 23.

1843.
March 11.

—
Lord
LYNDHURST,
L.C.

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In October, 1815, Charles Snoad was indebted to Messrs. Weller and Ellis in a sum of 2,000*l.*, and to Messrs. Watson and Meryon in a sum of 1,500*l.*, which sums were respectively secured by bonds executed in 1813. By indentures of lease and release of the 10th and 11th of October, 1815, and made between Charles Snoad of the one part, and Watson and Meryon of the other part, after reciting the bonds, and that for better securing the repayment of the money due thereon Snoad had agreed to execute that conveyance, Snoad conveyed some freehold hereditaments to Watson and Meryon in fee, upon trust to sell with all convenient speed, with or without the consent or concurrence of Snoad, his heirs, executors, or administrators ; and, in the meantime, until such sale should be made, to receive the rents of the said hereditaments, and to apply the monies to arise from such sale, and the rents so to be received, in payment to Weller and Ellis, of the said sum of 2,000*l.*, and the interest thereon, and then to pay or retain to themselves the said sum of 1,500*l.*, and the interest thereon, or so much as such monies

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would extend to pay, and to pay the surplus of the monies (if any) to Snoad, his executors, administrators, or assigns, or as he or they should direct or appoint.

The person who was beneficially interested in the said sum of 1,500*l.*, was Ann Holmes, and she afterwards, in November, 1818, lent Snoad a further sum of 300*l.*, on the security of the premises ; and, as a security for this further advance, he executed the following memorandum : “ 7th of November, 1818,—Memorandum, that Mrs. Holmes has this day advanced me the sum of 300*l.*, for which I am to execute to her a proper security, which I engage to do, as soon as the same can be prepared.” Snoad at the same time instructed his solicitor to prepare a deed to be indorsed upon the release of the 11th of October, 1815, for the purpose of effectually charging this sum of 300*l.* upon the hereditaments comprised in the release, and a further charge was accordingly prepared and indorsed, by which Snoad was made to covenant, that the hereditaments which, by the within written indenture, were conveyed by way of mortgage, and the money to arise from the sale thereof, were to be charged with the sum of 300*l.*, and he was also thereby made to covenant to do all *such further acts as might be required for the same purpose.

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In December, 1818, Snoad called at the office of his solicitor to execute this deed, but the solicitor was not then in his office. Snoad promised to call again the same evening to execute the security, but returned home without doing so, and died the next day suddenly. His personal estate, independently of the monies to arise from the sale of the hereditaments comprised in the mortgage of 1815, was not sufficient to pay his debts, and in 1820, the plaintiff Bayden, who was a simple contract creditor of Snoad, filed this bill against Messrs. Watson and Meryon and Snoad's widow, who was also his administratrix, and his two daughters, who were his co-heiresses-at-law, Weller and Ellis, Mrs. Holmes, and the cestuis que trust of the 2,000*l.* ; and he insisted, that by the indentures of October, 1815, the hereditaments therein comprised were converted into personalty, and that the proceeds, after payment of the two specific bond debts, were applicable as equitable assets to the payment of his debts, and prayed for relief accordingly. Nothing had been done towards carrying the trusts of these indentures into execution, and the rents were received by Mr. Snoad up to his death.

Upon the cause being heard before the Vice-Chancellor of England, his Honour decided in favour of the plaintiff, and from this judgment the defendants appealed.

Mr. G. Richards and *Mr. Willcock* appeared for the bond creditors, whose debts were recited in the release of 1815, and who had obtained an order that they should be at liberty to prosecute the decree, and—

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WATSON.

Mr. Stuart and *Mr. Daniell*, in support of the same interest, and contended, that the release of 1815 had effected a complete conversion of the real estate into personalty; that the trust to sell was positive, and the trusts of the deed could not be effected without a sale. They cited: *Van v. Barnett* (1), *Biggs v. Andrews* (2), *Doughty v. Bull* (3), *Fletcher v. Ashburner* (4), *Smith v. Claxton* (5), *Wright v. Rose* (6).

Mr. Bethell and *Mr. Anderdon*, for one of the co-heiresses of *Mr. Snoad*, and *Mr. Miller*, for the other co-heiress, contended, that the question of conversion would depend upon the intention of the parties, and their intention was shown by the recitals in the deed to have been to secure the repayment of the monies due on the bonds; that *Mr. Snoad* might at any time have demanded a reconveyance, upon paying the debts; and that as he continued to receive the rents for three years, during which the trustees did not interfere, it was evident that no absolute conversion was in the contemplation of the parties, but that the deeds were executed for a particular and limited purpose: *Emblin v. Freeman* (7), *Randall v. Bookey* (8), *Gibbs v. Ougier* (9).

Mr. Wakefield appeared for the widow of *Mr. Snoad*.

THE LORD CHANCELLOR:

1842.
Dec. 20.

The intestate, *Charles Snoad*, by indentures of lease and release of the 10th and 11th of October, 1815, conveyed certain lands and premises to *Mr. William Watson* and *John Meryon*, in fee, upon trust, that they, or the survivor of them, should obtain possession, and absolutely sell and dispose of the said lands and premises by public sale or private contract, and, upon payment of the purchase-money, convey the property so sold and the fee simple and inheritance thereof to the purchaser or purchasers, with or without the consent or concurrence of the said *Charles Snoad*; and that

(1) 19 Ves. 102. See next page.

(2) 5 Sim. 424. See next page.

(3) 2 P. Wms. 320.

(4) 1 Br. C. C. 497.

(5) 20 R. R. 320 (4 Madd. 484).

(6) 25 R. R. 209 (2 Sim. & St. 323).

(7) Prec. in Chanc. 542.

(8) 2 Vern. 425.

(9) 8 R. R. 348 (12 Ves. 413).

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they should pay the monies to arise from such sale, after defraying the expenses, unto certain creditors of the said Charles Snoad, named in the said deed, in discharge of the debts therein mentioned, and the surplus unto the said Charles Snoad, his executors, administrators, or assigns. The trustees did not sell any part of the lands and premises, and Charles Snoad died in the year 1818, the debts mentioned in the deed remaining unpaid. The main question is, whether the surplus, after satisfying the incumbrances, is to be considered as forming part of the real or personal estate of the intestate. It was contended, that this was, in effect, merely *a mortgage, and that the surplus would belong to the real estate; but the trust was, that the trustees should absolutely sell the property, and after discharging the incumbrances, pay the surplus to the owner, his executors, administrators, or assigns. The trust could only be performed by means of a sale. The trustees were not authorized to raise the money in any other way, and the surplus was to be paid to the owner, his executors and administrators. This, therefore, was a conveyance out and out, though for the purpose only of paying debts; but to use the words of Lord ELDON in *Van v. Barnett* (1), “a person may so convey, for that purpose, as to constitute on the property the nature of personalty.” It was said, the owner could have reconverted the property, but that is wholly immaterial, though he might undoubtedly have done so, had he paid the money in discharge of the incumbrances. He did not even declare any new intention as to the surplus, which, by the terms of the deed, was limited to his executors and administrators. The character, therefore, impressed on the property, remained unchanged up to the time of his death. Some reliance was placed on the circumstance, that nothing was done under the trust. The deeds were executed in 1815, and the testator did not die until three years afterwards, but this does not, I think, affect the question. The owner might have availed himself of the interim; he, however, did nothing; the character of personalty continued, and the surplus must be administered accordingly. This is a stronger case in favour of the personal estate than *Biggs v. Andrews* (2), decided by the VICE-CHANCELLOR OF ENGLAND.

On the 23rd of December, it was submitted to his Lordship, that

(1) 19 Ves. 102, where the real estate had been actually converted under a trust for sale.—O. A. S. of a possible re-conversion was referred to the Master for enquiry and report.—O. A. S.

(2) 5 Sim. 423, where the question

the indorsement of December, 1818, although unexecuted, showed that Mr. Snoad was treating the former deeds as constituting a mortgage only, and the property as still continuing to be realty. His Lordship said he would consider the point, and on the 11th of March, 1848, stated that the charge which was indorsed, amounted to no more than a direction to pay that additional sum of 300*l.* out of the proceeds of the sale, and did not, in his opinion, change the effect of the original deed in any way.

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v.
WATSON.

BARNARD *v.* SUTTON (1).

(12 L. J. Ch. 312—314; S. C. 7 Jur. 685.)

A. executed an assignment of personal estate, and a conveyance of real estate to a trustee, for the purpose of putting it out of the reach of his creditors. The trustee alleged, that a debt was due to him from A., for which he claimed to have a security upon the property. A. having filed a bill to have the deeds declared void, and to have the property delivered up to him, it was held, that he could maintain the suit; and it was decreed that the defendant had no claim upon the property, except as a security for his debt, and a reference was ordered to inquire whether any debt was really subsisting at the date of the deeds; and the question whether he had a security, even for the debt, if one should be found to have been due to him, was reserved.

1842.
Dec. 19, 20.

KNIGHT
BRUCE, V.-C.

On Appeal.

1843.

March 24.

Lord
LYNDHURST,
L.C.

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THE bill stated, that in the beginning of 1841, the plaintiff was indebted to several persons in various sums, amounting together to 700*l.* or 800*l.*; and also in a sum of 1,500*l.*, which was secured on mortgage of some freehold hereditaments at Newmarket, which he alleged to be of the value of 6,000*l.* By an indenture, bearing date the 22nd day of February, 1841, and made between the plaintiff of the one part, and the defendant of the other part, after reciting that the plaintiff was indebted to the defendant in a sum of 400*l.*, the plaintiff assigned all his household goods, furniture, and utensils, to the defendant, with a proviso for redemption, and in default the defendant was to sell the goods and furniture, and after paying himself out of the proceeds, he was to account for the surplus to the plaintiff, his executors, and administrators.

By indentures of lease and release, bearing date the 5th and 6th of April, 1841, and made between the plaintiff of the one part, and the defendant of the other part, after reciting that the plaintiff was indebted to the defendant in a sum of 4,000*l.*, and had applied to the defendant for a loan of 500*l.* more, the plaintiff conveyed his freehold hereditaments to the defendant in fee, subject to the prior

(1) *Symes v. Hughes* (1870) L. R. 9 Eq. 475, 39 L. J. Ch. 304, 22 L. T. 462.

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mortgage for 1,500*l.*, upon trust, to sell and pay off the mortgage debt of 1,500*l.* and the 4,500*l.*, alleged to be due to the defendant, and pay the surplus to the plaintiff, his heirs, executors, administrators, or assigns.

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The plaintiff alleged, that his object in executing these deeds was to authorize the defendant to sell the goods and furniture, and the mortgaged hereditaments, and to pay the plaintiff's debts out of the proceeds; that when they were executed no debt was due from him to the defendant; that the considerations, which were inserted in the deeds, were altogether fictitious, and that the *plaintiff never intended to give the defendant any beneficial interest in any of the property assigned or conveyed to him. The hereditaments, comprised in these deeds, were subject to a lease at the rent of 250*l.* per annum, and the defendant some time afterwards accepted a surrender of the lease, for which the tenant paid him a sum of 630*l.*

The defendant had caused the furniture to be removed from the house in which the plaintiff lived, to the next house to that in which the defendant resided; and the defendant had caused a brass plate, with his own name upon it, to be placed on the door of the house where the furniture was deposited.

The bill charged fraud on the part of the defendant, in procuring the deeds to be executed, and that he had received several sums of money.

The bill prayed, that the defendant might be decreed to deliver up these several indentures, and that the same might be cancelled, and declared fraudulent and void, and that the defendant might account for any sums received by him in respect of the goods and furniture, and of the rents and profits of the real estate; and that he might be restrained from selling any part of the said property.

The defendant stated, in his answer, that he had frequently advanced small sums of money for the payment of debts due from the plaintiff, who was also indebted to him for his professional services, as his medical attendant; and that in the beginning of 1841, he owed the defendant 480*l.*; that at that time several of his creditors were threatening to take legal proceedings against him; and that he and his wife applied to the defendant, and requested him to act as a trustee for them, and to take an assignment and conveyance of his household effects and real estate, for the purpose of providing for the repayment of the mortgage debt of 1,500*l.*, and the money due to the defendant, and to hold the residue of the property, upon trust, for the separate use of the plaintiff's wife, in order

that it might be preserved from his creditors, and furnish a provision for him and his wife.

BARNARD
v.
SUTTON.

The defendant at first refused to accede to this proposal, but at last he consented to accept such an assignment and conveyance as were afterwards executed. He admitted, that at the date of the deeds nothing was due to him except the sum of 480*l.*, and stated, that the considerations, which were inserted in the deeds, were such as were considered most likely to effect the object of the plaintiff. He did not claim any interest in any of the property, except as a security for the debt of 480*l.*; and said he had caused the real estate to be valued by Mr. George Robins, the auctioneer, who valued it at 2,500*l.* only. He admitted the removal of the furniture, as alleged in the bill, but stated that the plaintiff had intended to leave his former residence, and remove to the house next to the defendant's residence, for the rent of which the defendant had, at the request of the plaintiff, made himself responsible; and that the furniture was removed by the plaintiff's wife, who had come to live in the house, and that the name of the defendant had been placed on the door, at the suggestion of the plaintiff, for the purpose of preventing the furniture from being seized by any creditor of the plaintiff. He admitted he had received the 690*l.* for the surrender of the lease, which he had applied in payment of the expenses of the trust deeds, and of other sums due from the plaintiff, and he claimed a large balance to be still due to him, and he denied all the charges of fraud respecting the execution of the deeds.

No evidence was gone into on either side.

The cause came on to be heard before K. Bruce, V.-C., when very little argument was employed, no counsel having been instructed for the defendant till just before the cause was called on.

The VICE-CHANCELLOR ordered the defendant to bring the deeds into Court, and decreed that the assignment and conveyance could not stand except as a security for such (if any) debt as at the date thereof was due from the plaintiff to the defendant, and reserved the question, whether they ought to be considered as such security; and that it should be referred to the Master to inquire whether, at the date of these deeds, any and what debt was due from the plaintiff to the defendant, and to inquire what had been done under these deeds, or relating to the property comprised in them respectively, *and what monies had been received by the defendant.

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The defendant appealed from this decision.

BARNARD
v.
SUTTON.

Mr. Russell and *Mr. Blunt* appeared for the plaintiff.

Mr. Wakefield and *Mr. Rogers*, for the appellant, contended that the Court would not interfere in such a case as this. Here was a voluntary conveyance and assignment of the plaintiff's property, and the question was, with what intent was it done? The answer explained, that the object was to make a provision for the wife at the expense of the creditors of the plaintiff: *Lamplugh v. Lamplugh* (1); and the Court would not interfere between the parties, where the transaction was tainted with fraud. If a plaintiff had executed a deed for the purpose of committing a fraud with the assistance of the defendant, the Court would not assist the plaintiff if any disagreement afterwards arose between the parties.

[*Brackenbury v. Brackenbury* (2), *Groves v. Groves* (3), *Petre v. Espinasse* (4), *Aubert v. Maze* (5), *Cannan v. Bryce* (6), *M'Kinnell v. Robinson* (7), *Curtis v. Perry* (8), *Platamone v. Staple* (9), and other cases were cited.]

If the Court would not dismiss the bill, still the plaintiff's debt ought to be taken at the amount stated in the answer. The particulars of the defendant's claim were set out in a schedule, and there was nothing to contradict them; and therefore there ought not to be a reference to the Master to inquire into the amount of his claim; but there ought to be a decree that the deeds were an absolute security for the defendant's debt. The wife was a necessary party to the suit, as the answer stated, that the ultimate trust was for her benefit, and therefore a decree ought not to be made in her absence.

Mr. Russell, in reply, contended that the defendant admitted he had no interest in the property, except as a security for his own debt; and that the manner in which he alleged that debt to have been contracted, was of such a kind as to require a reference to the Master to inquire into its correctness. The wife had no interest whatever in the property.

1843.
March 24.

The LORD CHANCELLOR stated the particulars of the case as represented in the bill and answer, and said, he concurred in the opinion expressed by the VICE-CHANCELLOR, and he affirmed his Honour's decision, with costs.

- (1) 1 P. Wms. 113.
- (2) 22 R. R. 189 (2 Jac. & W. 391).
- (3) 32 R. R. 782 (3 Y. & J. 163).
- (4) 39 R. R. 254 (2 My. & K. 496).
- (5) 5 R. R. 624 (2 Bos. & P. 371).

- (6) 22 R. R. 342 (3 B. & Ald. 179).
- (7) 49 R. R. 672 (3 M. & W. 434).
- (8) 6 R. R. 28 (6 Ves. 747).
- (9) 18 R. R. 733 (Coop. 250).

CHANCERY COURT IN IRELAND.

IN RE PONSONBY, A LUNATIC (1).

(3 Dr. & War. 27—33; S. C. 5 Ir. Eq. R. 268.)

1842.

Nov. 5, 12.

SIR EDWARD
SUGDEN,
L.C.

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P. by his will directed that his widow and second son, who were the devisees of his estates, should apply a sum not exceeding 400*l.* per annum, to the maintenance and care of his eldest son John, who was a lunatic, and that whoever should at any time be in possession of his L. estate, should during the life of his said son, apply said sum annually for his comfortable support, care, and maintenance; and that said sum should be deemed, taken, and considered as a charge thereon. The L. estate was sold after the death of the testator, under a decree in a creditor's suit, and a sum of 10,550*l.* of the purchase money was invested in stock to the credit of the cause, to secure the payment of the lunatic's allowance, which, under an order of the Court, was fixed at 280*l.* per annum. At the death of the lunatic in 1842, the surplus of the dividends upon the stock amounted to 81*l.* 12*s.* 9*d.*; upon an application by the personal representative of the lunatic, claiming this sum as part of his personal estate, and a cross claim on the part of the owners of the estate, claiming under the second son: Held, that upon the true construction of the will, there was no greater charge upon the estate than what was actually required and applied for the maintenance and support of the lunatic; and that consequently, the sum in question did not form any portion of the personal estate of the lunatic.

Held also, that even if it did, yet that as the savings of the lunatic's maintenance, it belonged to the parties claiming under the widow and second son, who were in the situation of committee of the person of the lunatic; and that in any view of the case, the personal representative of the lunatic had no claim upon it.

Semble, the question had been already disposed of by the decree in the suit in 1837.

THE Right Honourable George Ponsonby, by his last will and testament, bearing date the 11th of May, 1812, devised as follows: "I give, devise, and bequeath to my wife the Lady Mary Ponsonby, for the term of her natural life, and for no longer or other period, all my estate and property, of whatever description, real, personal, or mixed; and, from and after her decease, I give, devise, and bequeath the same to my son William Robert Ponsonby, his heirs, executors, administrators, or assigns for ever. But whereas my eldest son John Ponsonby is, from the derangement of his understanding, entirely incapable of taking care of, or managing himself, or his affairs, I do hereby order and direct, and my wish is, that my wife during the term she shall be in possession of my estate in the county of Londonderry, in the province of Ulster, in that part

(1) *In re French* (1868) L. R. 3 Ch. explained *Strangways v. Read* [1898] 317, 37 L. J. Ch. 537, 18 L. T. 139; 2 Ch. 419, 67 L. J. Ch. 581.

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[*28]

of the United Kingdom called Ireland, and my son William Robert, while he shall be in possession of the same, shall apply a sum not exceeding 400*l.* per annum to the maintenance and care of my said son John. And my wish is, that whoever shall at any time be in possession of my said Londonderry estate shall, during the life of my said son *John, apply said sum annually for his comfortable support, care, and maintenance; and the same shall be deemed, taken, and considered as a charge thereon; and I do recommend that my said son John shall be continued under the care of Dr. Willis, with whom he now resides; but I do not by this recommendation mean to order or direct it, confiding entirely in the affection and discretion of my wife and my son William, that as each of them shall be in possession of my Londonderry estate aforesaid, they will respectively apply the sum necessary for his use (not exceeding 400*l.* per annum) in the way best suited to his unhappy state."

The testator died without having altered his will, and his widow, Lady Mary Ponsonby, entered into the possession of all his estates, real and personal, and continued in such possession until her death. In the year 1820, William Robert Ponsonby died; having by his will, bearing date the 5th of May, 1818, devised the Londonderry estate to trustees upon trust for the Honourable Frances Ponsonby, wife of the Lord Bishop of Derry, for life, for her separate use, with remainder to the said Lord Bishop of Derry for life, with remainder to the use of their first and other sons in tail male, with remainders over. After the death of William Robert Ponsonby, a suit was instituted by Mr. Thomas Tydd, a judgment creditor of William Robert Ponsonby; and on the 10th of May, 1829, a decree was pronounced, directing a sale of the Meath estate (which was part of the property of George Ponsonby), and in case that same should not be sufficient to pay the debts as well of George Ponsonby as of William Robert Ponsonby, then that the Master should proceed to a sale of the Londonderry estate.

[29]

In pursuance of this decree, the two estates were sold, the Meath estate producing a sum of 14,475*l.*, and the Londonderry estate a sum of 48,500*l.*

By an order in this cause of *Tydd v. Prittie*, bearing date the 14th of February, 1832, it was directed that a sum of 10,550*l.*, Old Three and a-half per cent. Government Stock, produced by the sale of the Londonderry estate, should be transferred to a separate account, to the credit of the said cause, to be entitled "An Annuity

Fund, for John Ponsonby, Esq., a Lunatic," with liberty to the committee of the person of the said John Ponsonby, or to any person entitled to receive the maintenance of the said lunatic, to apply from time to time during the life of the said lunatic, in relation to the dividends of said stock, and that the principal of said sum should stand impounded until after the death of the said John Ponsonby, with liberty to the parties and creditors in the cause to apply in relation thereto as they might be advised.

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By an order of the 9th of March, 1832, the Accountant-General was directed to draw on the Bank of Ireland in favour of Dr. Willis, for a sum of 150*l.* half-yearly, out of the dividends accruing due on the said sum of 10,550*l.* Government Three and a-half per cent. Stock, for the maintenance of the lunatic; but by a subsequent order of the 22nd of February, 1836, this allowance was reduced to a sum of 280*l.* annually.

By the final decree in the cause of *Tydd v. Prittie*, bearing date the 12th of January, 1837, it was ordered, amongst other things, that out of the annual dividends of said sum of 10,550*l.* Old Three and a-half per cent. Stock, a competent sum should be applied towards the maintenance *and support of said John Ponsonby; and that from and after the death of the said John Ponsonby, the dividends to accrue thereon, and in the meantime that the annual interest and dividends of the said funds then standing to the credit of the cause, and of all other such fund as should or might thereafter be brought into Court to the credit of the cause, be paid to the said Frances Ponsonby, or her attorney lawfully authorized, for and during the life-time of her husband the Lord Bishop of Derry, provided she should so long live; and from and after the death of the said Frances, and in case the said Lord Bishop of Derry should survive her, then the said dividends and interest were decreed to be paid to the said Lord Bishop of Derry, for and during his natural life; and from and after the death of the survivor of them, then to their only son William Brabazon Ponsonby.

[*30]

On the 31st of March, 1842, John Ponsonby, the lunatic, died; and it appeared, that after payment to Dr. Willis of the respective annual sums pursuant to the orders of the 9th of March, 1832, and the 22nd of February, 1836, and also the sums due for medical attendance and funeral expenses, there remained a sum of 812*l.* 9*s.* 11*d.*, being the surplus of the dividends which accrued due on the said sum of 10,550*l.* stock.

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Mr. Bessonnet now moved on the part of the Honourable Francis Prittie and Elizabeth his wife, who was administratrix of the lunatic, that this sum should be paid over to them, as constituting part of the personal estate of the lunatic.

[31] THE LORD CHANCELLOR :

There was a case before Lord Brougham of *Grosvenor v. Drax* (1), where he directed an account, such as is here sought, against the committee of the lunatic. The order was a new one, and the committee appealed to the Privy Council. All the great lawyers of the day were assembled—Lord Brougham, Lord Eldon, Lord Lyndhurst, Lord Manners, Lord Wynford, Sir William Alexander, Sir John Leach ; the question was solemnly argued, whether such an account could be ordered : and it was held unanimously, that the committee was entitled to retain the savings of the lunatic's maintenance, and the order was reversed. Since that case the point has never been raised, and the savings have always been considered as belonging to the person who had the care of the lunatic, and not to the lunatic's personal estate. But it seems to me that the decree pronounced in the year 1837, in the cause of *Tydd v. Prittie*, has disposed altogether of the question. I wish counsel would look into this point, and mention the case again on this day week.

Nov. 12.

In the meantime a petition was presented on the part of the Lord Bishop of Derry and Frances Ponsonby, his wife, under the will of William Robert Ponsonby, the second son of the testator, praying that this surplus might be transferred to them.

Mr. Serjeant Warren and *Mr. Hawkins* for the Bishop of Derry and Frances his wife ;

Mr. Bessonnet for Prittie and wife, referred to *Seale v. Seale* (2).

[32] THE LORD CHANCELLOR :

If this case rested on the will alone, the point would seem to be free from doubt. The testator, by his will, directs that his wife and son, the devisees of the testator, "shall apply a sum not exceeding 400*l.* per annum, to the maintenance and care of my son, John ; and my wish is, that whoever shall at any time be in possession of my said Londonderry estate, shall, during the life of my said son, apply said sum annually for his comfortable support,

(1) 2 Knapp, 82.

(2) 1 P. Wms. 290.

care, and maintenance, and that sum shall be deemed, taken, and considered as a charge thereon." Then he recommends that he shall be continued under the care of Dr. Willis, with whom he was then resident; and again provides, that his wife and son, as each of them shall be in possession of his estate, shall apply the sum necessary for his use (not exceeding 400*l.* per annum) in the way best suited to his unhappy state. The argument for the administratrix assumes, that under this will, there is an actual charge upon the estate to the extent of 400*l.* per annum. But such is not the case. There is nothing more than a direction that his wife and son (the testator seems not to have contemplated the probability of the lunatic's surviving both) shall apply a sum not exceeding 400*l.* The effect is, that the sum of 400*l.* should be applied, if necessary, and to that extent the estate is charged; but if so large a sum should not be required, then the will does not make any sum beyond what was required, a charge. I am clearly of opinion, that there was no greater charge upon the estate, than what was actually required and applied for the maintenance and support of the lunatic. The widow and second son were placed in the situation of committee of the person of the lunatic; it was left to their discretion what sum should be applied to the maintenance of the lunatic. Therefore, *in every point of view, whether the widow and son are looked upon as committee of the lunatic, and as such entitled to the savings, according to *Grosvenor v. Drax*, or as owners of the estate upon which this sum was no charge, except to the extent in which it should be required, I am of opinion, that the present petitioners, claiming under the widow and second son, are entitled to this surplus.

[*33]

But independently of this, it appears to me, that the decree which was pronounced on the 12th of January, 1837, concludes the point; for it directs that out of the annual dividends of the said sum of 10,550*l.* Old Three and a-half per cent. Stock (which sum had been invested by an order of the 11th of February, 1832, upon the sale of the estate, to produce an annuity fund for the lunatic), a competent sum should be applied towards the maintenance and support of the lunatic; and that from and after his death, the dividends and interest to accrue from said sum, and in the mean time, that the annual interest and dividends should be paid to the said Frances Ponsonby (one of the petitioners) for her life, and after her death, to her husband; and after the death of the survivor, it directs that the entire principal sum shall be paid to

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their son, the inheritor of the estate. Now this perfectly disposes of the question. I shall, therefore, in this case, follow the decree, and declare, that Frances Ponsonby is entitled to the surplus of the dividends on the Government stock.

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(3 Dr. & War. 104—124; S. C. 5 Ir. Eq. R. 173; former proceedings,
2 Dr. & War. 192—207.

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Nov. 14, 15,
19.
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In 1812, W., who was entitled to a mortgage executed in the year 1802, filed a bill against V., the mortgagor, to foreclose and sell; the mortgagor not having appeared, a decree upon sequestration was obtained against him. In 1830, the mortgagee having in the meantime died, and the suit having been revived by his representatives, a receiver was appointed over a portion of the mortgaged premises, the residue being at the time in the possession of an earlier creditor. In the year 1833, and during the progress of the account in the Master's office, the mortgagor died intestate, and the suit was thereupon revived against his heir-at-law and personal representative. The heir-at-law appeared in the suit, but did not answer, and the report having been made up, in 1837 a decree for a sale was pronounced. On the investigation of the title it was discovered, that shortly before the filing of the bill in 1812, on the occasion of the marriage of V. the mortgagor, the equity of redemption in the mortgaged premises had been put into settlement, and limited to the mortgagor for life, with remainder to trustees for a term of years, to secure a jointure for his intended wife, and portions for the younger children of the marriage, with remainder to his first and other sons in tail male. This settlement, however, was never registered. In the month of May, 1838, the plaintiffs filed the present supplemental bill against the parties claiming under the settlement, seeking the benefit of the decree and the former proceedings. The widow and younger children having set up as their defence the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27):

Held, that the possession of the mortgagor was not adverse to the mortgagee, when the statute passed, the possession being partly in the Court and partly in the earlier incumbrancer; and that there was, therefore, nothing to take away from the mortgagee the benefit of the fifteenth section.

A bill of foreclosure is not a suit in equity for the recovery of the money charged upon the land, although it may lead to that; but it is, in effect, a suit to obtain the equity of redemption, which is, in the view of equity, an actual estate.

The right to file a bill of foreclosure, whether the mortgage be legal or equitable, falls within the twenty-fourth section of the Real Property Limitation Act, 1833, and the Real Property Limitation Act, 1837 (7 Will. IV. & 1 Vict. c. 28); and the time is governed by the legal right of the party to bring an action, or if he have not the legal estate, by the right which he would have had, if his estate had been a legal instead of an equitable one.

Though the appointment of a receiver does not prevent the bar of the

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| (1) <i>Pugh v. Heath</i> (1882) 7 App. Ca. | 46 L. T. 356; <i>Baddley v. Consolidated</i> |
| 235, 238, 51 L. J. Q. B. 367, 46 L. T. | <i>Bank</i> (1886) 34 Ch. D. 549, varied on |
| 321; <i>Harlock v. Ashberry</i> (1882) 19 | app. 38 Ch. Div. 238, 57 L. J. Ch. 468, |
| Ch. Div. 539, 543, 51 L. J. Ch. 394, | 59 L. T. 419. |

statute from operating against a stranger, yet it will serve to prevent, at least in this Court, time from running in favour of a stranger to the suit.

A suit in a court of equity, properly instituted, will prevent time from running; and a court of law ought to act upon this principle, the same rule being prescribed by the statute for both Courts. This Court, however, will protect its own jurisdiction, and will not permit a suitor to be evicted at law, who has an equitable right to sue for the land, and has filed his bill within the limit allowed, and duly pursued his remedy.

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IN this case a decree had been pronounced in the month of February, directing a general account on foot of a mortgage of the 29th of November, 1802, executed by John Vize, since deceased, which had become vested in the plaintiffs [and which had been originally made to John Wrixon, since deceased, to secure 199l. and further advances.

John Wrixon commenced proceedings for foreclosure in this suit in June, 1812, and the bill stated that further advances had been made by him to Vize, to the amount of 157l. 5s. 8d., since the date of the mortgage.

The subsequent proceedings in that suit and the following circumstances of this case are taken from the report of the former hearing of this case in 2 Dr. & Warren, commencing at p. 193.]

To this bill Vize, though served with a *subpcena*, never appeared; [2 Dr. & War. 193] and in the month of July, 1813, a conditional decree upon sequestration was obtained against him, and an account was directed on foot of the mortgage, and of all prior incumbrances.

In the month of March, 1816, John Wrixon, the mortgagee, died (no further proceedings in the suit in the meantime having been taken), having appointed his widow, Elizabeth Wrixon, and Anne Thompson, executrixes of his will. Wrixon having been indebted in his life-time to one John Cuthbert, his executrixes after his death, by deed of the 30th of September, 1817, executed a sub-mortgage of the premises comprised in the deed of 1802, to the said John Cuthbert; and in the month of November, 1828, the executrixes of Wrixon and the representatives of Cuthbert (who had died some time in the year 1824) filed a bill of revivor and supplement against Vize, and certain other defendants, who had obtained a lease of part of the mortgaged premises from Vize, and against Wall a prior mortgagee, who had instituted proceedings in the Court of Exchequer. This bill prayed that the suit might be revived, and the proceedings in *Wall's* cause might be stayed; and for an account on foot of the deed of mortgage of the 29th of November, 1802, and of all prior incumbrances.

On the 12th of February, 1831, Vize not having appeared,

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although duly served with process, a conditional decree upon sequestration was pronounced; and no cause having been shown, that decree was made absolute in the month of January, 1832, and the usual accounts were thereby directed.

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Under this decree various proceedings were had, relative to the accounts directed by the decree, and a draft report was prepared; but before same was signed by the Master, in the month of February, 1833, Vize, the mortgagor, died intestate, leaving the present defendant, John Bennett Vize, his eldest son and heir-at-law; and in the month of June, 1835, a bill of revivor was filed against the said John B. Vize, as such heir-at-law, and Samuel Hawkesworth, the administrator of the deceased John Vize.

To this bill John B. Vize alone appeared, but did not answer, and the cause having been duly revived, the Master made his report on the 23rd of December, 1836, and thereby found that the representatives of Cuthbert, having been paid in full what was due upon foot of their sub-mortgage, had by deed of the 14th of January, 1833, reconveyed the same to the executrixes of Wrixon; and that, consequently, they were entitled to the entire sum due on foot of the mortgage of the 29th of November, 1802: upon which mortgage there was then due, for principal and interest, as well on account of the original sum, as of the several advances made under the borrowing clause, a sum of 1,001*l.* 10*s.* 1*d.* The Master, by his report, stated, that none of the defendants, nor any person on their part, attended before him.

In the month of February, 1837, the cause was set down to be heard upon this report, and a decree was then pronounced (no counsel having appeared for the defendants), directing the defendant, John B. Vize, to pay within three months the sum reported due, and in default thereof, that the defendants should be foreclosed of all right and equity of redemption to the said lands and premises, and that the same should be set up and sold, and that the defendants *should bring in and lodge in the Master's office all title deeds in their possession.

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The money not having been paid within the appointed time, nor the title deeds lodged, in the month of November, 1837, a conditional order for an attachment was obtained at the Rolls, on behalf of the plaintiffs, against the defendant, John B. Vize, for not bringing in the said deeds, as required by the decree; and on the 8th of December, 1837, John B. Vize filed an affidavit as cause against the said conditional order, and there stated, that his father,

John Vize, had married in the year 1812, and that, upon that occasion, in consideration thereof, and of 1,000*l.*, which was his wife's fortune, the equity of redemption in the said lands and premises had been put in settlement, by a deed bearing date the 17th of April, 1812, and limited to the use of John Vize for life, with remainder to trustees to secure an annuity of 150*l.*, for his wife for her life, and portions for the younger children of the marriage, and subject thereto to the use of the first and other sons of John Vize in tail male.

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On the 24th of May, 1838, the executrices of Wrixon, as sole plaintiffs, filed an original bill in the nature of a supplemental bill, stating all the above-mentioned facts and proceedings; bringing before the Court the parties claiming under the settlement of the 17th of April, 1812, and praying that as against them they might have the benefit of the former proceedings; and that the mortgaged premises might be sold in pursuance of the directions of the final decree of the 16th of February, 1836, and that said decree might be carried into execution.

The plaintiffs, by their bill, stated, that the settlement of the 17th of April, 1812, had never been registered, and that they were not aware of its existence, and that the defendant, John B. Vize, although he had appeared to the bill of revivor of June, 1835, had never suggested the existence of said settlement, but permitted the plaintiffs to obtain a report and decree, as if such settlement had never been executed. They stated also, that in the month of October, 1836, the present defendant, John B. Vize, had filed a bill in this Court, praying, among other things, that he might be at liberty to redeem the mortgage of 1802, and stating particularly the title of the said John Vize, but that he had never served the plaintiffs with a *subpena*, and that the plaintiffs were not aware of the contents of this bill, until after the filing of the affidavit before mentioned.

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They further stated, that as it appeared by the Master's report that the sub-mortgage to Cuthbert had been paid off, and a reconveyance obtained to the plaintiffs, Cuthbert's representatives had ceased to be necessary parties.

The defendant, John B. Vize, and the parties claiming under the settlement, answered this bill at great length; they insisted that there was nothing due to the plaintiffs on foot of the original mortgage, for that some time in the year 1804 an annuity of 30*l.*, to which John Vize was entitled, and also a judgment, obtained by

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him against one Westcomb, had been assigned to Wrixon in satisfaction of the debt. They stated further, that Wrixon was a person in distressed circumstances, and not likely to have permitted any sum to have remained due to him, while there were ample means to obtain payment within his own control; and they submitted, that, under all the circumstances, the suit so instituted by Wrixon *ought to be considered as having been abandoned, and that it was not competent to have revived the same in the manner in the bill stated; and they relied on the Statute of Limitations in bar of the claim. The defendants further submitted, that the accounts, which had been taken, were fraudulent and erroneous, and taken in their absence; that the report was obtained *ex parte*; and that they were now entitled to have the accounts opened, and to insist upon proofs of the several items claimed in respect of the mortgage and the borrowing clause, and to be permitted to go into evidence for the discharge thereof.

On the part of the defendants, two letters were read in evidence, written in the year 1810, by Wrixon to Vize, the mortgagor, requesting the latter, as a favour, to pay certain small sums of money for him. These letters were relied on as being inconsistent with the existence of any debt due from Vize to Wrixon at the time.

The cause came on to be heard on the 10th of February; it was conceded, that there should be a decree for the plaintiffs; but it was contended on the part of the defendants, that a general account should be directed of what was due on foot of the original mortgage; and that the defendant, John B. Vize, could not be bound by the accounts, which had been taken in his absence. He was made a party as heir-at-law of the mortgagor, in which character he had no interest whatsoever. It was further insisted on the part of the defendant, John B. Vize, that he, as remainderman, could not be liable for the arrear of interest, which had accrued during the life of the tenant for life, and which the latter was bound to pay.

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On the part of the plaintiffs it was insisted, that the defendants at most should only have liberty to surcharge and falsify the accounts, which had been taken under the decree of 1832.

The LORD CHANCELLOR directed the question to be argued on the following day [and after argument he held that a general account should be taken, as there had been no one present when the former accounts were taken who was interested in their being taken fairly.

Some of the LORD CHANCELLOR's observations on that hearing have already been reported : see 59 R. R. 674.]

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The case now came before the Court, upon a petition of rehearing on the part of the widow and younger children of John Vize, the mortgagor, claiming under the settlement of 1812; and by their petition they prayed, that the bill should be dismissed, inasmuch as the right of the plaintiffs to recover was barred by the Statute of Limitations, 3 & 4 Will. IV. c. 27, a period of twenty years from the date of the mortgage having elapsed prior to the institution of the suit, without any payment on account of principal or interest having been made on foot of the mortgage, or without any acknowledgment in writing having been given.

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In addition to the facts which have been already stated, the only material circumstances are the following : the plaintiff's mortgage comprised two denominations of land, one called the lands of Droumduffe, which were in the occupation of the mortgagor, Vize; the other called the lands of Cottage, which were in the possession of a mortgage creditor, whose security was prior to that of the plaintiffs. In the month of December, 1829, an order was obtained at the Rolls, on the application of the plaintiffs, for a reference to the Master, to approve of a proper person to be receiver over the lands and premises in the possession of the defendant John Vize; and the Master having subsequently made his report, approving of Mr. Robert Bailey, as receiver, the same was confirmed on the 23rd of July, 1830; and on the 11th of September, 1830, Bailey accordingly executed the necessary securities, and, as such receiver, entered into the receipt of the rents of the lands of Droumduffe, *and has continued in such possession from that period up to the present time.

[*106]

Mr. Brooke, Mr. Pigot, and Mr. Haig, for the petitioners, the widow, and younger children :

* * The proceedings, it is true, were binding upon John Vize, the mortgagor; but these parties do not claim under him; their title is paramount, and therefore, up to the year 1838, the proceedings in the suit were *res inter alios actæ*. * * In this case, therefore, *primâ facie*, the plaintiffs' right is barred as against the widow and younger children, by the operation of the fortieth section, there having been no payment of interest by those parties, nor any acknowledgment in writing signed by them or their agent,

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for a period of more than twenty years. * * The defendants' case comes to this; here is a mortgage upwards of forty years old, upon foot of which there has been no payment of any part of the principal money, or the interest due thereon, or any acknowledgment in writing, for more than twenty years; the only circumstance to save the bar of the statute being the decree in the suit, in which suit, the widow and younger children were not parties.

The *Attorney-General*, *Mr. Collins*, and *Mr. R. Martin*, for the plaintiffs:

[*110] It is clear that a payment of interest by John Vize, the mortgagor, or even an acknowledgment in writing signed by him, would have brought this case with the proviso in the fortieth section, and saved the plaintiffs' rights even as against the present petitioners. This is established by *Lord St. John v. Boughton* (1). Now although there has not been an actual payment of interest, or acknowledgment in writing, yet there has been what is tantamount to it, namely, a decree of this Court against the mortgagor for *payment of the money, and after a solemn adjudication by a court of justice, [113] how is it possible to argue that the statute can apply? * * *Doe v. Williams* (2) is a distinct authority for the plaintiffs, in which case, though no interest had been paid upon a mortgage for more than twenty years, yet as the possession was not adverse, and as the heir of the mortgagee had brought his ejectment within the period given by the fifteenth section, the Court of Queen's Bench held, that the ejectment was not barred by the statute, and that the heir was entitled to recover.

Mr. Pigot, in reply:

Assuming, for the sake of argument, that the possession was not adverse, nevertheless, the plaintiffs' rights are not saved by the fifteenth section, for that section only applies to the previous clauses, whereas the present proceeding is governed by the fortieth section, upon which the fifteenth section has no operation. * * *

Nov. 19.

THE LORD CHANCELLOR:

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The principal questions which were argued were, first, that here there was an adverse possession, and consequently, even if this case fell within the early sections of the statute 3 & 4 Will. IV. c. 27, yet the right was barred by the twenty years' adverse possession,

(1) 47 R. R. 224 (9 Sim. 219).

(2) 44 R. R. 421 (3 Ad. & El. 291).

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and it did not fall within the fifteenth section. Secondly, that if the possession was not adverse, yet the case fell within the fortieth section, which was not governed by the fifteenth, and that in this view also, the twenty years' possession was a bar.

Now although the conveyance was by way of mortgage, the right to bring an action, or make an entry, clearly falls within the second section. This admits of no doubt, and was decided by the case of *Doe v. Williams* (1); and unless the circumstances of this case raised an adverse possession, the possession of the mortgagor was not adverse to the mortgagee, and consequently the latter had five years to bring his action, or make his entry under the fifteenth section. In this case the remedy was pursued by a bill in this Court; and one question is, whether a bill for a foreclosure and sale falls within the first fifteen sections of the Act, or is wholly confined to the fortieth section. In the latter case there is no saving, and it is indifferent whether there was or not any adverse possession. In the former case the fifteenth section would save the right, if the possession was not adverse when the Act passed.

The second section having provided the twenty years as a limitation of time, the third section declares from what *period the time shall run in the several cases provided for. The only provision in this section which could apply to mortgages is the last part of it, viz., "when the person claiming, or the person, through whom he claims, shall have become entitled, by reason of any forfeiture, or breach of condition, then such right shall be deemed to have first accrued, when such forfeiture was incurred, or such condition broken." Mr. Justice PATTERSON in *Doe v. Williams* (2) observed, that if the third section was intended to comprehend the case of a mortgagee, it is very ill penned; and the fortieth section, if meant to apply to an action of ejectment, is still worse penned. It seems clear that the fortieth section does not apply to an ejectment. The doubt as to the third section was followed by the statute 7 Will. IV. & 1 Vict. c. 28, by which power is given to any person entitled to or claiming under any mortgage of land (being land, within the definition of land in the first section of the former Act), to make an entry, or bring an action at law, or suit in equity, to recover such land at any time within twenty years next after the last payment of any part of the principal money, or interest secured by such mortgage, although more than twenty years may have

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(1) 44 B. R. 421 (5 Ad. & El. 291).

(2) 44 B. R. 421, see p. 426 (5 Ad. & El. 291, 297).

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elapsed since the time, at which the right to make such entry, or bring such action, or suit in equity, shall have first accrued. This Act, therefore, left the former Act still to point out when the right first accrued. By the fourteenth section of the first Act, an acknowledgment in writing, within the terms of that section, operates to make the time run only from that period ; and the last Act gives a like effect to the payment of any part of the principal or interest. The first Act in the seventh section *carefully provides, that no mortgagor shall be deemed a tenant at will within the meaning of that clause.

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The object of the Legislature was to bind courts of equity by the rules of the statute, and not to permit them any longer simply to adopt the legislative measure by analogy. Accordingly the twenty-fourth section provides, that no person, claiming any land in equity, shall bring any suit to recover the same, but within the period, during which, by virtue of the provisions before contained, he might have brought an action to recover the same, if he had been entitled at law to such estate, interest, or right in or to the same, as he shall claim therein in equity. And the twenty-eighth section provides expressly for twenty years' possession by the mortgagee, without acknowledgment, being a bar to the mortgagor. Its connexion with the twenty-fourth section throws some light upon the intention of the Act. The twenty-fourth section is not well framed, for, as far as it bears on this case in words, it would apply only to an equitable mortgagee, and give him the same right in equity, as he would have had at law, if he were a legal mortgagee : but it is impossible to suppose that where a mortgagee is entitled to relief in equity, he was not still to have the right within the time appointed, although he had a legal estate. An equitable mortgagee could clearly file a bill for a foreclosure and for the legal estate under the twenty-fourth section : and as the intention seems clear, it is not difficult by a slight modification to give the enlarged construction to the twenty-fourth section. The statute 1 Vict. c. 28, appears to be a legislative adoption of that construction, as it provides, that any person entitled to, or claiming under, any mortgage of land, may bring an action, or suit in equity, to recover *such land, within the time thereby limited, although more than twenty years may have elapsed since the time at which the right to bring such action, or suit in equity, shall have first accrued. This must mean the right under the statute 3 & 4 Will. IV., and consequently the legal and equitable rights under that statute are treated

as being co-extensive. It appears to me, therefore, that the right to file a bill of foreclosure, whether the plaintiff's mortgage be a legal or an equitable one, falls within the twenty-fourth section of the statute 3 & 4 Will. IV., and the 1 Vict. c. 28, and that the time is governed by the legal right of the party to bring an action; or if he have not the legal estate, by the right which he would have had, if his estate had been a legal instead of an equitable one. If the twenty-fourth section does not extend to a legal mortgage, then it is a *casus omissus* out of the Act; and as the general right of a mortgagee to file a bill of foreclosure is not taken away, equity would once more adopt the legal rule by analogy.

The fortieth section is confined to actions and suits to recover the money secured by any mortgage, judgment, lien, or legacy: and the terms of that section may render it necessary to distinguish the cases within the early sections, and those subject to this; even where the fifteenth section has no operation. Now it is settled, that a mortgagee of the legal estate may recover the land under the second section, although the right to recover the money falls within the fortieth section. Why should not the same distinct rights belong to a mortgagee in equity? Why may he not, for example, file a bill of foreclosure in equity, to obtain the estate, discharged of all equity of redemption, or pursue his remedies at law or in equity for the money upon his bond *or covenant. In *Dearman v. Wyche* (1), with which, when I had occasion to refer to it incidentally (2), I was inclined to concur, the VICE-CHANCELLOR held, that a bill of foreclosure fell within the fortieth section, for it is in substance a suit in equity for recovery of the money. It is, the Court said, a suit to recover money. But, with great respect I say it, I cannot, upon consideration, take this view of the statute. I think that the statute provides a remedy for the recovery of the estate, and also a remedy for the recovery of the money; clearly so, when both are pursued, or one is pursued at law; and equally so, I think, when both the remedies are enforced, or only one of them is enforced in equity. A foreclosure suit may lead to the payment of the money. But this is optional with the defendant. It cannot be enforced against him. The plaintiff's right is simply to foreclose; but he can only accomplish that upon a previous condition. The right of the defendant to pay the money, whilst the only right of the plaintiff is to the estate discharged of the equity, can hardly bring the case within the fortieth section, which applies strictly to

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(1) 9 Sim. 370. Over-ruled upon this point. (2) *Henry v. Smith*, 59 R. R. p. 738.

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an action or suit to recover the money secured by any mortgage. This right at law cannot be confounded with the right to recover the estate. Why should it in equity? It cannot, I think, be said, that the suit is not to recover the land, as it is already vested in him, for this expression would be strictly accurate, where the mortgage is of the equitable estate; and where the mortgage is a legal one, yet the suit is, in effect, to recover or obtain the equity of redemption, which is, in the view of equity, an actual estate.

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Upon the whole, therefore, it appears to me, that the *plaintiffs' right depends upon the early sections in the statute 3 & 4 Will. IV., and consequently that they are within the savings of the fifteenth section, unless the possession was adverse. The mortgage in this case, was partly a legal one, and partly equitable, for over a portion of the estate there was a prior mortgage; but ultimately and pending the suit, the plaintiffs have obtained the legal estate in that portion also.

It was observed by the learned Judge, in *Dearman v. Wyche*, that it appeared to him, that the framers of this statute of Will. IV., did not sufficiently consider what they were about, for although there was this restriction in the fortieth section, upon a suit to recover the money, yet if the decision in *Doe v. Williams* as to adverse possession were correct, and he confessed it appeared to him to be so, there was no commensurate restriction upon a corresponding suit for recovery of the land. This shows how narrow a construction the statute received in that case; but my view seems to render all parts of it consistent. It probably escaped observation, that *Doe v. Williams* was decided upon the doctrine of non-adverse possession, before the Act, which brought that case within the saving of the fifteenth section. But by the general operation of the Act, independently of the fifteenth section, time runs, although the possession be not adverse; and, therefore, notwithstanding that there is some variance between the fortieth section of the statute 3 & 4 Will. IV., and the second, third, and fourteenth sections of that statute, and the 1 Vict. c. 28, yet there is the same restriction upon a suit for recovering the land, as there is upon a suit for recovery of the money.

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The fifteenth section of the statute 3 & 4 Will. IV. saves *the right, where the possession or receipt of the profits shall not, at the passing of the Act, have been adverse to the right or title of the person, claiming to be entitled thereto. Now the bill was filed as far

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back as 1812; a decree on sequestration was obtained in 1813; a bill of supplement and revivor was filed in 1828, and in 1830 an order for a receiver was obtained, and the receiver collected some of the rents. As to another portion of the estate, it was held by a prior mortgagee. In February, 1831, there was another decree upon sequestration; and in February, 1833, Vize died. It is clear then, the possession or receipt of the profits was not adverse to the mortgagee when the Act passed, for the possession was partly in the Court, and partly in an earlier incumbrancer. There is nothing, therefore, to take away from the mortgagee the benefit of the fifteenth section.

The objection is made by the widow and younger children, claiming under the settlement of 1812; Vize's eldest son also claims under that settlement as a purchaser. The prior mortgage was registered, but the settlement was not, and Vize's heir having been brought before the Court, by bill of revivor, he entered an appearance, and then suffered, after a report, a decree for a sale to be taken against him in his absence, and he then brought in the deeds. This led to the discovery of the settlement; whereupon a bill of supplement was filed against the trustees of the settlement, and the widow and younger children. They, by their answer, set up the Statute of Limitations, but did not insist upon it at the hearing; and now this rehearing is had in order to try that defence. It is argued, that the plaintiffs had no right to file such a bill under the twenty-fourth section at all, and no right to do so under the fortieth section, as twenty years had elapsed, and there was no saving. The plaintiffs, it is *said, must recover on the strength of their own case, and as the statute bars the estate, as well as the remedy, they cannot rely upon the weakness of the defendant's case. The plaintiffs are disqualified to sue. But I have already expressed my opinion, that there was no adverse possession, and that the case falls within the fifteenth section.

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It was argued that this case falls within the principle of my decision (1), that the appointment by this Court of a receiver does not prevent the bar under the statute, against a stranger; but this is the converse of that case, and I shall consider myself perfectly consistent in holding, that the appointment of a receiver prevents, at least in this Court, time from running in favour of a stranger to the suit. The possession of the Court by its receiver, is the possession of the suitor, and how can time run against a person in

(1) *Harrison v. Duignan*, 59 B. R. 689 (2 Dr. & War. 295).

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possession. In the case of *Hill v. Stawell* (1), the creditor, who was held to be barred, was not a party to the suit. A suit in this Court, properly instituted, will prevent time from running; and a court of law, now that the same rule is prescribed by the statute for both Courts, should, I conceive, act upon that principle; at all events, this Court will protect its own jurisdiction, and would not permit the suitor to be evicted at law, who had an equitable right to sue for the land, and had filed his bill within the limit allowed and duly pursued his remedy. I am not, however, called upon to decide that question, for here the plaintiffs cannot be evicted at law.

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It is said that the possession became adverse upon Vize's *death, in 1838, as his death determined his tenancy at will; but that tenancy had been long previously dissolved by the proceedings in this suit. The title of the widow and children is merely equitable, and was so far a concealed incumbrance, that the deed was not registered. It is not denied that the plaintiff's right can be enforced against the real and personal representative of Vize, the mortgagor. Can then the equitable claim of the widow and children, under this unregistered settlement, stand upon a higher ground; they undoubtedly have a better title, if they chose to avail themselves of it, and they have obtained relief under the decree already pronounced. They were never in possession, but they contend that the plaintiffs have no right to file a bill against them. Be it so; then the plaintiff's last bill must be dismissed against them. In what situation will they then stand? If they do not abandon their right, as they cannot proceed at law, not having the legal estate, they must file a bill. Now if they file a bill, claiming equity, they must offer to do equity. They being out of possession, and claiming only an equity, cannot pretend that they have, under the Statutes of Limitation, acquired any legal estate, or any higher equity, than they had under the settlement. They cannot, therefore, obtain more than the Court gave them by the decree at the hearing. But if they succeeded in their present defence, the Court might be well warranted in proceeding in their voluntary absence, and excluding them from all relief. This defence has wholly failed, and I dismiss the petition of rehearing, with costs.

(1) 2 Jebb & S. 389.

MARTYN *v.* BLAKE.

(3 Dr. & War. 125—142; 5 Ir. Eq. R. 72.)

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The established rule of this Court (which however is only general and not inflexible) is, that interest cannot be recovered upon the arrears of an annuity.

But interest will be given upon the arrears of an annuity, where the person bound to pay it has been a party to the deed by which it was created, and his acts disclose a system of gross misconduct, and opposition to the Court, for the purpose of evading payment.

Mere legal delay is not a sufficient ground to induce the Court to give interest: nor will a mere covenant to pay an annuity be sufficient to create an exception to the general rule.

But if there is a covenant to indemnify an annuitant against the effect of incumbrances, and the perception of the annuity has been prevented by the claims of incumbrancers, and especially if this has occurred in consequence of the acts of the covenantor, a case for damages under the covenant is clearly shown, and this Court, in order to prevent circuity of action, obtains jurisdiction to give interest upon the arrears of the annuity.

THIS case came before the Court upon exceptions to the Master's report. The facts [are fully stated in the judgment].

Mr. Brooke, Mr. Berwick, and Mr. Molyneux for the exception, [130]
[claimed interest on the arrears of an annuity].

Mr. Pigot and Mr. Concanon, contra.

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Mr. Berwick, in reply.

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[The arguments of counsel sufficiently appear from the following judgment:]

THE LORD CHANCELLOR:

I will look into the authorities, to which I have been referred, before I finally dispose of this case. I do not at present feel much difficulty upon the question.

In 1800 a declaration of trust in the nature of a mortgage, was executed between George Blake and John Blake, *the mortgagee and mortgagor; and by this deed it was arranged, that the rents and profits of the mortgaged premises (which consisted of a leasehold interest in some mensal lands), should be applied first to the payment of the rent and renewal fines, necessary to be paid in order to preserve the interest in the lease; then in payment of the accruing interest upon the mortgage debt, and subject to those payments, the residue of the rents was to be paid to John Blake, the mortgagor, for his life; and after his decease to be applied in liquidation of the principal sum due on the foot of the mortgage.

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This arrangement was simple enough ; but in the year 1808, a new arrangement was entered into between John Blake and his son James Cuffe Blake ; and by the deed then executed, John Blake vested the estate in two trustees, upon trust, in the first place, to grant the father a lease of a particular portion of the lands, containing something more than 100 acres, at a nominal rent, then to keep down the head-rent and renewal fines, then to pay John Blake an annuity of 100*l.* per annum, then to pay off with the surplus rents the *corpus* of certain debts specified in the deed, amongst which was included the mortgage of 1800. These trusts were followed by a special trust to indemnify the father, the portion of the lands to be demised to him, and his annuity of 100*l.* per annum, against the incumbrances specified therein, and all debts or incumbrances of James Cuffe Blake the son, and also against all costs, charges, damages, and expenses whatever, for or in respect thereof, or which the said John Blake should sustain, or be put to by reason thereof. The deed also contained a covenant by James Cuffe Blake to that effect ; and the ultimate interest was vested in James Cuffe Blake, his executors, administrators, and assigns.

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Now this deed of 1808 could not, of course, have the effect of binding the mortgagee of 1800, who was not a party to it, and who is now represented by the plaintiff in this cause, to take his capital before the death of the mortgagor, the time provided by the deed of 1800, if he chose to object ; the trusts are simple, and supposing that they had been properly executed, and that the prior mortgagee had not chosen to receive the *corpus* of his debt before the time agreed upon, the fund ought to have been reserved and laid by to accumulate as a capital, to discharge the mortgage at such time, as the same could be paid off. This was the plain duty of the trustee.

According to this deed, however, James Cuffe Blake was not entitled to receive any thing out of the property until all the incumbrances were satisfied ; it is perfectly clear, that he was not to receive a single shilling, not only until the interest upon the charges and renewal fines were paid, and the obligations of the lease performed, but until the annuity of 100*l.* a year should have been fully paid to his father, and all the incumbrances discharged.

It appears that the mortgagee entered under the deed of 1800 (I am not sure that the evidence is quite clear upon the point), but I must suppose that he did. There was no complaint of any arrear of interest at the time of the execution of the deed of 1808. The annuity provided for the father soon fell into arrear, and he

filed a bill in the year 1811, for the purpose of raising the arrears. Amongst others, James Cuffe Blake, and the person entitled to the mortgage of 1800, were made parties to the suit. A decree upon sequestration was pronounced against the son, and the father having applied to the Court, obtained *an order for the appointment of a receiver. On proceeding to carry the appointment under that order into effect, the most violent opposition was offered to the process of the Court by James Cuffe Blake, who was then in possession of the lands. It is not necessary to recapitulate the facts connected with his conduct upon that occasion ; I shall merely observe that it was most painful to hear the evidence on the subject read. The result was, that an attachment was obtained against him, and the order was made absolute. J. C. Blake, then discovered, that he could not any longer, by means of his own title, oppose his father's claim to the annuity, and that some other means must be resorted to. It is not necessary for me to consider what passed between him and the mortgagee. I need not suppose that he was the party, who put forward the mortgagee upon that occasion, but the mortgagee, being a defendant in the suit, or rather his representative, Martyn did come forward, and in the absence of James Cuffe Blake (not because he was not a party to the suit, not because he was not bound, but because he was in contempt and contumacious), asked that the receiver should remain in possession, but with a direction to pay over all the balances in his hands, in satisfaction of the interest on the mortgage, after the rent and renewal fines were paid. On that application the Court discharged the receiver, and put Mr. Martyn himself into possession, without prejudice to the rights of the other parties. Mr. Martyn thus went into possession of the lands with the knowledge of the Court, and under its order and sanction. His possession was, therefore, really the possession of the Court, and consequently he, and those acting under him, were subject to the authority of the Court, and the Court had a right to deal with his possession, as it thought fit.

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In what manner then should Martyn have acted when in possession ? He could not say he was merely dealing with the lands under the deed of 1800, for having impressed upon himself the character of mortgagee in possession, he was bound to act as such ; if it was his wish only to receive the interest of his mortgage debt, he was not at liberty to pay himself that interest, and disregard the due application of the residue of the rents. He should

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have acted with regard to the residue, as if he were the mortgagor. He was bound to apply it in the discharge of all just and legitimate claims affecting it, and not of his own demand alone. If then he had so applied the rents, the case would have stood thus; looking to the deed of 1800, the surplus would have gone to the mortgagor, but the mortgagor had transferred the property upon the trusts of the deed of 1808, and this transfer was made with Martyn's knowledge; Martyn was, therefore, bound by those trusts, and was not at liberty to appropriate the surplus rents to any other purposes. Looking then to the deed of 1808, he was bound in the first instance to pay the rent and renewal fines; then the interest upon his own mortgage; then the annuity to the father; and then to provide for the *corpus* of the other debts, specified in the deed of 1808. Entering as he did, by the authority of the Court, in place of the receiver, it was his duty to apply the rents as that receiver would have done; but the moment after he obtained possession, he relinquished it. It was not a real transaction, it was a mere trick and contrivance. The Master has found, that with the exception of a short period, during which the receiver was in possession, from 1817 to 1821, James Cuffe Blake was in possession down to the year 1880. What then is the irresistible inference, but that James Cuffe Blake obtained this possession behind the back, and contrary to the intention of the Court, by the *instrumentality of Martyn, the mortgagee? I ought to subject the mortgagee to all the liabilities which would have attached upon him, if he had continued in possession. If the receiver had remained in possession, the annuity would have been regularly paid, but he suffered James Cuffe Blake to receive all the rents, which should have gone to the payment of the annuity, and then to the reduction of the debts, which would have been long since extinguished, and a clear fund left for payment of the annuity.

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These are not the only material circumstances of the case. Mr. Blake the father died in 1823, leaving a personal representative who proved his will; that personal representative might at once have come before this Court to assert his rights, which subsequent events show he was ready to do; but James Cuffe Blake began an opposition in the Ecclesiastical Court, which, after five years of frivolous and vexatious litigation, was declared to be such by the Court; but in this way, he prevented the creditors from getting anything out of the estate. If ever there was a case, not simply of vexation, but in which the party's acts disclose a system of gross

misconduct, and direct opposition to the Court, for the purpose of evading payment of an obligation, to the creation of which he was himself a party, this is that case, and upon that ground alone I think the arrears of this annuity should bear interest.

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The established rule of the Court, I agree (but it is not an inflexible, it is only a general rule), is, that interest cannot be recovered upon the arrears of an annuity, and it is clear that mere legal delay is no ground for giving interest. I remember a case before Sir John Leach, when Vice-Chancellor, which was well calculated to try the rule. A *party purchased an annuity created by a will, which had been regularly paid for many years; a bill was afterwards filed to have the accounts of the testator's estate taken, and the Court refused to allow any more payments to be made on foot of the annuity, until the accounts were taken, and ordered the fund to be paid into Court. I made a very reasonable motion upon the part of the purchaser of the annuity, that so much stock as would be sufficient to answer his annuity should be appropriated to that purpose, and invested, so that if ultimately it should appear that there was a clear fund, he, and not the residuary legatee, should have the benefit of the accumulations; but the application was refused, as being contrary to the practice of the Court. The consequence was, that the purchaser never got one shilling of interest upon the arrears of his annuity, pending the suit, although the person, under whom he derived, had been in receipt of the annuity for years, and although he was deprived of possession by the act of the Court, and the fund, out of which it was payable, was productive, so that the interest actually went into the pocket of the residuary legatee. I mention this to show how far the rule has gone.

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As to another part of the case, I may at once dispose of an objection, which has been made by *Mr. Pigot*, viz., that here there are other parties interested, namely, the creditors of James Cuffe Blake, and that I cannot give interest against them, however I might act if the question were between the original parties or their representatives; but the answer to this is, that the deed, under which they derive their interest, contains an express trust to indemnify the *father and his annuity of 100*l.* a year against all prior incumbrances, and I do not know how that indemnity can be executed, except by payment of the annuity, in the same manner as if the prior incumbrances had not existed. The damage, which he has sustained, was the not receiving the

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annuity during the course of so many years. If he had received the annuity regularly, it would have been money, which might have been put out to interest, and the only mode of placing the annuitant in the same position as if his annuity had been paid, is by giving him interest on the arrears.

There was besides, a covenant by James Cuffe Blake to pay the annuity, and also indemnify his father, and the annuity against all losses or damages, which might be occasioned by the prior incumbrancers. That a mere covenant to pay an annuity will not enable the Court to give interest, is quite settled; but a covenant to indemnify a man against the effect of incumbrances, is a covenant of a very different nature, and if the perception of the annuity was prevented by the claims of incumbrancers, and especially if this has occurred in consequence of the acts of the covenantor, then a case for damages under the covenant has been clearly made out. No doubt if an action were brought upon that covenant, the covenantee would be entitled to recover interest upon the arrears as damages; the losses were incurred in consequence of the existence of the prior incumbrances, and after the allowing of Mr. Martyn, as mortgagee, to go into possession upon the discharge of the receiver, no one can dispute, that a loss did accrue to the annuitant from this cause.

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Now as to the jurisdiction of this Court, this case falls *within the principle laid down by Lord HARDWICKE, and which, since his time, has been always followed, that although there may be a covenant sounding in damages, over which, in its inception, the Court may not have original jurisdiction, and to enforce which, you must go to a court of law; yet if the jurisdiction of this Court attaches in some other respect, and that the covenant comes in collaterally, this Court acquires jurisdiction, and will dispose of the whole matter before it, in order to prevent a circuitry of action, which it abhors. If I were to send this case to trial in a court of law, for damages, I know what the measure of damages would be, namely, the amount of the arrears of the annuity and interest on those arrears, and on the cause coming back, I should have to give the party that relief; I, therefore, feel called upon to give interest on the annuity, according to the rules of this Court, for the purpose of preventing circuitry of action.

This case is distinguishable from that of *Booth v. Leycester* (1); the covenant there was only for payment of the annuity, and

(1) 44 R. R. 75 (1 Keen, 247; 3 My. & Cr. 459).

although no doubt in the clauses of distress and entry, and in declaring the trusts of the term, whereby the annuity was secured, such expressions were used as “costs, charges, damages, and expenses, incurred, &c., by reason of, or on account of the non-payment of the annuity;” yet the Court there held, that these words only amounted to an indemnity against the costs incident to the entry and possession, and against any loss from enforcing the security. But here there is a covenant to indemnify the annuitant against prior incumbrances. *Booth v. Leicester* was, I think, well decided; but it appears to *me to be distinguishable from this case, which seems to fall within the principle of *Gay v. Cox* (1), although it is very different in its circumstances. In the present case I feel I am not overruling any case, or going beyond the rule as laid down by my predecessors, when I decree the payment of interest on the annuity.

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The only remaining question is, from what period shall this interest be paid? I think the time, when the receiver was obtained, in 1817, should be the period, for the arrears could have been kept down then, had not Mr. Martyn dealt with the possession in the manner he did, and allowed James Cuffe Blake to re-enter into possession. I, therefore, propose, to overrule the Master's report, and to allow the exception, and declare the party entitled to interest on the arrears of the annuity from that period.

If upon looking into the authorities, I see reason to alter my opinion, I will mention the case again. If I do not mention it, the exception may be considered as allowed, and the interest can be calculated and added to the arrears, without any necessity for a further reference to the Master.

The LORD CHANCELLOR did not mention the case again.

MURRAY v. JOHNSTON.

(3 Dr. & War. 143—149.)

A testatrix by her will, devised Blackacre, to her nephew F. for life with remainder to his first and other sons in tail male, remainder to R. and several other nephews successively for like estates; and she devised Whiteacre to R. for life, remainder to his first and other sons in tail male, with remainders over to F. and several other nephews in the same manner. Afterwards she made a codicil, and reciting the gifts to F. and R. and declaring her wish to give to R. the property there devised to F. and vice

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(1) 1 Ridg. P. C. 153.

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versâ, she revoked the said gifts, and devised the provision by her will given to F., to R., his heirs, executors, administrators, and assigns, and in lieu thereof, devised to F. his heirs, executors, administrators, and assigns, the property she had by her will given to R.: Held, that the limitations over in the will to the other nephews of the testatrix were revoked, and that R. and F. respectively took absolute interests in their gifts.

ANNE JOHNSTON, the testatrix in this case, being seised of a house in Eccles Street, Dublin, and also of houses in Abbey Street, and being possessed of some paintings and other articles of virtu, which were preserved in her house in Eccles Street, made her will, dated the 21st of June, 1834, and thereby gave the said Eccles Street house, and all articles therein, at the time of her decease, to trustees upon trust, for her nephew Francis S. Johnston, and his assigns for his life, remainder to his first and other sons in tail male; remainder to her nephew William Johnston for life, remainder to his first and other sons in tail male; with similar remainders to her nephews, George, Richard, Andrew, and Henry Benjamin Johnston, and their respective issue; with an ultimate remainder to Francis S. Johnston, in fee. And the testatrix directed her trustees, to the utmost of their power, to preserve her paintings, &c., so that the same might descend, "in the nature of heir-looms, to the said respective tenants for life," who should, from time to time, occupy the Eccles Street house. And the testatrix by her said will further devised two houses situated in Abbey Street, to her said nephew Richard Johnston, for life; with remainder to his first and other sons in tail male; remainder to the said Francis S. Johnston, for life, remainder to his first and other sons in tail male; remainder to the said William Johnston, for life, with similar remainders over to Andrew, Robert, and Henry Benjamin Johnston, and their issue male; with an ultimate remainder to Francis S. Johnston, in fee.

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On the 20th of June, 1841, the testatrix executed a codicil to her said will, "declaring that in all cases where legacies or other provisions have been made by my said will, for any of the same persons (with the exception hereinafter made with respect to my nephews, Francis and Richard Johnston), the legacies hereby bequeathed are to be over and above, and in addition to, the legacies and provisions devised by my said will." After bequeathing some pecuniary legacies, the testatrix proceeded thus: "Inasmuch as by my said will, I devised my house and concerns in Eccles Street, with certain other bequests, to my nephew Francis Johnston, and it is now my wish to bequeath the said house and concerns, and

all other the property by said will devised to the said Francis Johnston, to my nephew the Rev. Richard Johnston, and to give all the property by my said will devised, to the said Richard Johnston, to the said Francis Johnston, I do hereby revoke the said bequest, by my said will made to the said Francis and Richard, respectively, and do leave and bequeath the said house and premises with the appurtenances, and all the furniture and pictures, ornaments and moveables therein (save my jewellery and wearing apparel) and also all other the property and provision by my said will devised to the said Francis Johnston to the Rev. Richard Johnston, his heirs, executors, administrators, and assigns; and in lieu of the said bequest in favour of the said Richard Johnston, as to all the property of what nature or kind by my said will devised to the said Richard Johnston, I devise and bequeath the same to the said Francis Johnston, his heirs, executors, administrators, and assigns." And the testatrix bequeathed her jewellery and wearing apparel to a Mrs. Murray. The testatrix had not mentioned her jewellery in her will.

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A bill having been filed to carry into execution the trusts *of this will and codicil, and the usual reference to the Master having been made, he, by his report, found, that Richard and Francis Johnston, respectively, took absolute interests in the Eccles Street and Abbey Street premises.

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To this report, exceptions were taken by William Johnston, that the Master should have reported, that under the said will and codicil, Richard and Francis Johnston took only estates for life, in the properties devised and bequeathed to them respectively, with remainders to their first and other sons in tail male, with remainders over, to the several other nephews of the testatrix, and their sons, in the order and for the estates expressed in the said will.

Mr. Serjt. Keatinge, and Mr. Henderson for the plaintiff.

The Attorney-General, and Mr. Brereton for the defendant William Johnston, in support of the exceptions:

The question is, whether there is an absolute revocation and new disposition of gifts, or merely a substitution of persons. There is no express revocation of the gift to William Johnston; his name is not mentioned in the codicil, much less is there any declaration that he had ceased to be an object of the bounty of the testatrix.

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The true construction is merely to substitute Richard for Francis, and *vice versâ*, without disturbing the limitations over. "Heirs" in the codicil, may be construed to mean the special heirs of the will, viz. "issue," *Goodtitle v. Woodhall* (1), *Sherratt v. Bentley* (2). The case of *Philipps v. Allen* (3) will probably be relied upon at the *other side; but it differs from the present in several important features. In that case the first codicil recited the devise for life and the subsequent limitations, and then the testator devised his said real estate, &c. to James D. Lloyd, and his heirs, under the same conditions and limitations, as he had by his will devised the said estate to John Lloyd; but here the testatrix confines the new devise to the "property and provision" given by her to Francis Johnston and R. Johnston, not referring to the limitations. Again, in another codicil, the testator, after reciting the first devise, revoked the said Penty Park estate, and devised said estate to James P. Lloyd, on condition, that he took the name and arms of Philipps. Three of the Judges of the court of law, to which the case was sent, certified their opinion against any revocation of the limitations over, and Mr. Justice PARKE, who dissented from his brethren, appears to have relied much on the word "estate." The clause directing a name and arms to be assumed, which does not occur here, was there much relied on, in favour of the supposed intention to give a fee; and so also, in *Robinson v. Robinson* (4). If the codicil here is to be construed with strictness, the construction will be, to give each devisee of the property given in the codicil an estate therein for the life of the devisee, to whom the same property had been given by the will. *Willet v. Sandford* (5), *Doe v. Hicks* (6), *Thornhill v. Hall* (7), *Lord Carrington v. Payne* (8), *Boon v. Coirnforth* (9), *Coryton v. Helyar* (10), were also referred to.

Mr. Serjt. Warren, and Mr. Keatinge for the report, were stopped by the COURT.

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THE LORD CHANCELLOR:

I cannot persuade myself that in this case there is really any room for doubt. The testatrix, having two distinct properties, by her will set about disposing of them in strict settlement. The

(1) Willes, 592.

(2) 39 R. R. 168 (2 My. & K. 149).

(3) 7 Sim. 446. See *post*, p. 38.

(4) 1 Burr. 38; 2 Ves. Sen. 225.

(5) 1 Ves. Sen. 186.

(6) 36 R. R. 1 (8 Bing. 475).

(7) 37 R. R. 1 (2 Cl. & Fin. 22).

(8) 5 R. R. 87 (5 Ves. 404).

(9) 2 Ves. Sen. 276.

(10) 2 R. R. 75 (2 Cox, 340).

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premises in Eccles Street she gave to one nephew for life, with remainder to his first and other sons; and then to the next nephew, and so on, through all her relations; and she gave most anxious directions about certain paintings and articles of taste, which she desired should go, according to her expression, as heir-looms, with the Eccles Street property; nothing could be more distinct than the language of the bequest. Then followed the disposition of the Abbey Street houses, which she gave in the first instance to the one of the nephews, to whom she had given the first remainder in the former property, with similar remainders over, but including the nephew, the first taker of the Eccles Street property. Having made these arrangements, the testatrix, some time afterwards, executed a codicil, and referring to the two devises of the houses in Eccles Street and Abbey Street to the nephews, to whom she had given them for life, she certainly does not go on to mention the subsequent remainders which she had limited, but it is manifest she took the first limitation of each property, as representing the whole line of limitations. Taking then each first devisee, as the head representing the entire series, she says, I mean to change this disposition, and as to the property by my will bequeathed to my nephew Francis, I now give it to my nephew Richard, his heirs, executors, administrators, and assigns; and in like manner, I give to my nephew Francis, his heirs, executors, administrators, and assigns, the property I had bequeathed to Richard. It was argued that the testatrix had not revoked all the gifts of these houses; I agree she did not do so in express terms, *but she considered one gift as representing all, and said in effect, generally, I revoke those benefits which I had conferred by my will, and make a new disposition in lieu thereof. Suppose, that instead of using any words of revocation, she had simply made the new disposition and said, I now give the property, which I before gave to the devisee of the Abbey Street houses, to the devisee of the Eccles Street houses, his heirs, executors, &c. (using the latter words, because the bequest consisted partly of real and partly of personal estate), must I not have held, that the latter took the whole estate in the subject of the gift? I am not at liberty to submit to mere conjecture the interpretation of wills, it is my duty to give to express dispositions the effect, which the law attributes to them, unless some different meaning of the testator can be pointed out.

I have been referred to cases in which the word "heirs" was held to mean "issue;" but in all those cases, there were words in

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the will to show that the word "heirs" was used in that sense, and by which it could be so interpreted; but where on the face of this codicil can you show me any thing to justify the interpretation, which is sought to be put upon these devises? Independently of the intention of a testator, I must give to his words the import, which the law attaches to them. Now the law says, that a gift to a man and his heirs, is a gift in fee simple. How can I, in opposition to this rule of law, say, that in this case, these words mean a life-estate only? And this too, when from the whole frame of the will, I see that the testatrix knew perfectly well how to guard her dispositions and express her meaning. Nor is there anything untechnical in the codicil; she might, it is true, have added to her sentence, "and all *remainders expectant thereon," but the omission of these words does not raise the slightest doubt in my mind, as to her intention. She had altered the entire scheme of her bounty, and she has expressed what she intended. Looking at the nature of her property, she probably saw the folly of tying it up, as she had done by her will, in a strict settlement. In her will, she had made no express mention of her jewels, but she no doubt considered them as included in the general disposition of the articles in the houses. In the codicil there is an exception of the jewels, which shows an intention to change the disposition of her will in that respect also, for she disposes of those jewels absolutely to another person.

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As to the case cited, *Philipps v. Allen* (1), I think it was rightly decided upon the effect of the word "estate;" but it was a much more difficult case than the present, for here are words of inheritance, which in that case were wanting. There they had to arrive at the conclusion by construction. As to the argument, that a literal construction of these instruments would only give estates *pur auter vie*, I am not obliged to adopt an absurd and inconsistent construction, when one that is plain, reasonable, and consistent is open to me. The case has been very well argued, but it is perfectly free from doubt, and the exceptions must be overruled, but without costs, as the bill has been filed to obtain the opinion of the Court on the will and codicil for the direction of the trustees.

(1) 7 Sim. 446; a case which turned upon the special context of the will as denoting the meaning which the testator applied to the word "estate."
 —O. A. S.

BALDWIN v. BELCHER;
IN RE CORNWALL, A BANKRUPT (1).

(3 Dr. & War. 173—177.)

The bankruptcy of a debtor will not prevent the application of the general rule of marshalling securities in favour of a secured creditor, for the assignee stands in the position of the bankrupt.

1842.
 Nov. 29.

SIR EDWARD
 SUGDEN,
 L.C.
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GEORGE CORNWALL, being a creditor of William Baldwin, obtained from him in the year 1832, assignments of two policies of insurance, which he had effected upon his own life. William Baldwin also conveyed to George Cornwall, his life estate in certain premises, to pay the premiums on the policies and the interest upon the debt. George Cornwall effected six other policies of insurance on the lives of William Baldwin and other persons.

George Cornwall being so possessed, and having occasion to borrow 5,000*l.*, from his brother, Henry Cornwall, assigned to him these eight policies, by deeds bearing date the 19th of February, 1836, and on the same day, executed *to him, an assignment of the life-estate of William Baldwin, together with a mortgage of the lands of Tullyland. Subsequently, and in the same year, George Cornwall, mortgaged his equity of redemption in Tullyland, to Thomas Wise, for the sum of 6,000*l.*

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On the 16th of March, 1837, George Cornwall committed an act of bankruptcy, and on the 1st of July, in the same year, a commission was issued against him, and a person named Robert Tresilian Belcher, was chosen assignee. William Baldwin died in May, 1830, and a dispute having arisen between Henry Cornwall, and the assignee Belcher, as to whether the policies were in the disposition of George Cornwall at the time of his bankruptcy: the question was argued before his Honour, Mr. Commissioner Macan, in the month of May, 1839, who decided, that three of the policies had been well assigned to Henry Cornwall, but that the others were in the bankrupt's order and disposition, inasmuch as notice of the assignment of the latter had not been given to the insurance companies.

The bill in the cause of *Baldwin v. Belcher* was filed by Henry Baldwin, against the assignee Belcher, Henry Cornwall, and others, for the purpose of raising family charges affecting the lands of Tullyland, which were prior to the mortgage of the 19th of February, 1836. A decree to account had been pronounced in the cause, and the accounts were in progress in the Master's Office.

(1) *Heyman v. Dubois* (1871) L. R. 13 Eq. 158, 41 L. J. Ch. 224, 25 L. T. 558.

BALDWIN
v.
BELCHER.
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The proceeds of the three policies to which Henry Cornwall had been declared entitled by the order of May, 1839, had *been invested in the joint names of the assignee Belcher and Henry Cornwall, and the lands of Tullyland being likely to prove insufficient to discharge both mortgages, a petition was presented on the part of Henry Cornwall, praying for an order, that he might be paid the produce of the three policies of insurance, and undertaking to give credit for the proceeds thereof in the said cause of *Baldwin v. Belcher*, and also in the bankrupt matter.

The *Solicitor-General* for Henry Cornwall.

Mr. Keller, for the assignee Belcher, contended that though Tullyland would be sufficient to meet the amount of Henry Cornwall's claim, yet it would not be adequate to pay the second mortgagee, Wise, and consequently would be unproductive to the general creditors; and that, therefore, the policies, which were a fund available for the general creditors, ought not to be taken from them, for the benefit of the second mortgagee, who had no specific lien upon them.

Mr. Serjt. Warren, *Mr. Collins*, and *Mr. Jenkins*, for Thomas Wise :

The rule of marshalling applies; now the nature of the right is this, that where there are two creditors, one having a single fund, the other having two funds; the single fund shall be protected against the creditor who has two. This protection must be given by paying the latter out of the fund, upon which the former has no lien. The interest of the general creditors cannot affect this right: *Aldrich v. Cooper* (1), *Averall v. Wade* (2).

[176] THE LORD CHANCELLOR :

This case stands thus. A person, who has since become a bankrupt, having certain policies of insurance, and also an estate, borrowed a considerable sum of money, the repayment of which he secured by a mortgage of the estate, and an assignment of the policies. He then executed a further mortgage of the estate alone, to another person, and subsequently became a bankrupt.

The estate of the bankrupt is insufficient for the payment of both the mortgages, and a contest ensues between the second

(1) 7 R. R. 86 (8 Ves. 382, 389). 252); see also *Barnes v. Racster*, 57
(2) 46 R. R. 218 (Ll. & G. t. Sugden, R. R. 401 (1 Y. & C. C. C. 401).

mortgagee and the general creditors. The first mortgagee is not affected by this contest; he is to be paid the amount of his demand in the first instance.

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v.
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The assignee who represents the general creditors, is not interested in the estate, which is not sufficient to satisfy the mortgages upon it, but he is deeply interested in the policies; and says it is hard that the second mortgagee should derive benefit from a fund not included in his security to the prejudice of the general *bonâ fide* creditors.

The rule of law is perfectly settled. If there are two creditors, who have taken securities for their respective debts, and the security of first creditor ranges over two funds, while the security of the other is confined to one of those funds, the Court will arrange or marshal the assets, so as to throw the person, who has two funds liable to his demand, on that which is not liable to the debt of the second creditor. Is there any thing to take the present case out of the operation of this general rule? The fact of the bankruptcy cannot have that effect. The assignee stands exactly *in the place of the bankrupt, and in no better position, and is bound in the same manner. As far as the deed of assignment is considered, its language is not peculiar; it contains the provision, that the amount of the policies shall go in liquidation of the charge.

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The general rule must, therefore, be applied in this case in favour of the puisne mortgagee.

HEMPHILL v. M'KENNA (1).

(3 Dr. & War. 183—194; S. C. 2 Con. & L. 76; 6 Ir. Eq. R. 57.)

A possessory bill ought to state that the plaintiff has been in the actual, quiet, and peaceable possession of the premises in question for three years at least before the filing of the bill, saving the disturbances given by the defendant; and if there has been a mixed possession, partly by the plaintiff and partly by the defendant, so that it cannot be said that either of the parties had a triennial possession, this Court will not interfere, but will leave the parties to settle their rights at law.

1842.
Nov. 3, 19,
30.
Dec. 2.

SIR EDWARD
SUGDEN,
L.C.

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THE bill in this case was filed on the 9th June, 1842, and it prayed that the defendants, their servants, and agents might be restrained by injunction, from ferrying passengers for hire across the river Anna Liffey, with the plaintiffs' ferries, and from giving the plaintiffs any disturbance in the possession and enjoyment thereof.

(1) *Neill v. Devonshire* (1882) 8 App. Ca. 135, see pp. 146, 185.

HEMPHILL
 M^cKENNA.

The bill stated, that his Majesty King Charles the Second, by letters patent, bearing date the 22nd of May, 1677, granted unto the Mayor, Sheriffs, and Commons, of the city of Dublin, and their successors for ever, the ferry or passage over the river Anna Liffey, together with the privilege of transporting, carrying, and recarrying all manner of passengers over the said water, and all fees, profits, and commodities and advantages, with the fee of one half-penny to be taken of every passenger, that should pass in any of the ferry boats over the said river; together with free liberty to erect one or more ferry boat or boats for the carrying and transporting all manner of passengers to and from the said city over the said water, to hold and enjoy the said ferries, and all fees, profits, commodities, and advantages, with the fee of one half-penny, or less (if less was then accustomed to be taken), of any passenger that should pass in the said ferry, unto the said Mayor, Sheriffs, Commons, and citizens, of the said city of Dublin, and their successors for ever.

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The bill then stated, that his said Majesty, by his said letters patent, for himself, his heirs, and successors, did strictly charge and command, that no other person or persons, should at any time thereafter, exercise, keep, or maintain any ferry, boat, or boats, or carry over any person or persons whatsoever, for gain or hire, over the said river, at any place or places between the bridge of Dublin and the Ringsend, other than the Mayor, Sheriffs, Commons, and citizens, and their successors, or such person or person as should from time to time be lawfully authorized under them.

The bill then alleged, that by indenture bearing date the 15th of August, 1835, the said Corporation demised to William Walsh, his executors, administrators, and assigns, the said several ferries established and used on the said river, together with all and singular, the tolls, profits, and advantages, to the said ferries respectively belonging, to hold the same with the appurtenances, rights, and privileges, thereunto belonging, for the term of ninety-nine years, from the 29th of September, 1817.

The bill then stated, that William Walsh, by his last will, bequeathed all his estate and interest in the said ferries, and his right and title under the said lease of August, 1835, to the plaintiffs Richard Hemphill and William Walsh, upon trust for certain uses in the said will mentioned; and that he departed this life on the 13th of May, 1840, having appointed the said plaintiffs the executors thereof; and that they duly proved the same.

The bill then charged that Dennis Kenna, one of the defendants, having been for a considerable time in the *constant habit of carrying passengers for hire in boats across the said river, and within the said ferries, the plaintiffs in Easter Term, 1841, brought an action on the case in the Court of Queen's Bench, against the said Dennis Kenna, for the disturbance of the said ferry: that said action came on to be tried at the sittings after last Hilary Term, on which occasion a verdict was found for the plaintiffs.

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v.
M'KENNA.
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The bill then charged, that notwithstanding that the said plaintiffs had thus established their exclusive right to the said ferries at law, nevertheless, that the said Dennis Kenna, combining with Bernard M'Kenna, John Spain, and other persons, were in the daily habit of carrying passengers in boats for hire across the said river and within the plaintiff's ferries, under the pretence that there were not a sufficient number of boats kept by the plaintiffs for the accommodation of the public; the contrary of which the plaintiffs charged to be the fact.

The above statement comprises the entire of the plaintiffs' bill. On the 16th of June the plaintiffs obtained at the Rolls, a conditional order for an injunction in the terms of the prayer of the bill.

On the 25th of June one of the defendants, Bernard M'Kenna, filed an affidavit as cause against this conditional order. In this affidavit he stated, that he knew nothing of the alleged patent, and that he was advised that it was not competent for the Corporation to make any grant or demise to the plaintiffs, or the persons whom they represented, conferring an exclusive or any right to the said ferries in question: that it did not appear by the recital of said alleged lease, that the lessors professed to demise anything more *than the ferries at that time established, by which was meant certain ferries situate on that part of the said River Liffey, lying between Carlisle Bridge and the point opposite to the corner of Creighton Street, and which ferries were understood to be under the control and authority of the Corporation of the city of Dublin; that though attempts had been made by the plaintiffs, yet, that the said Corporation, nor any one claiming under them, had never pretended to have any right to, or authority over, any of the ferries situate beyond the corner of Creighton Street, on the east point of the river. That the ferries now sought to be disturbed by the plaintiffs, were not situate within the limits hitherto understood and recognized as the part of the river, on which the Corporation had a right to erect and use ferries; and that these ferries had been

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used and exercised for a period now beyond the memory of any person living, without any interference or disturbance on the part of the said Corporation or any person deriving under them. That William Walsh, the lessee in the said lease of the 15th of August, 1835, had never, during his life-time, claimed any right to these ferries ; but that about a year since, the plaintiffs set up a ferry at a remote part of the east point of the river, in which place no ferry had ever previously existed ; that same was done, as defendant believed, for the purpose of giving a colour to the exclusive claim of right now asserted by the plaintiffs, and for the purpose of creating embarrassment in the way of ascertaining the limits, within which the right now claimed should be confined, and which right was necessarily a matter of much doubt and difficulty, from the changes which had occurred in the names and boundaries of the localities, existing at the time of the alleged grant.

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With respect to the action at law, the defendant in his affidavit stated, that he had heard and believed that the defence was most unsatisfactorily conducted, and that in consequence of the manner in which the question was presented to the jury, the verdict did not establish any such right as the plaintiffs claimed, and he submitted that not being a party to the said action, he ought not to be bound by the said verdict. That it was untrue that defendant was in the daily habit of transporting passengers in boats for hire across the said river, within the ferries of the plaintiffs : for that he never did interfere with the ferries, which were recognized as the ferries belonging to the said Corporation : although the monopoly, which had existed as to these ferries, was productive of much public inconvenience and complaint, owing to the want of proper accommodation, and there not being a sufficient number of boats : that the plaintiffs had lately instituted proceedings at law against him in the Court of Exchequer : that on the 28th of May he had entered an appearance to the said action ; and that the plaintiffs having filed a declaration against him, he had on the 17th of June pleaded thereto.

On the 3rd of November the case was argued at the Rolls ; when his Honour was pleased to disallow the cause shown, with costs ; and the defendant, M'Kenna, now appealed from the order of his Honour.

Mr. J. J. Murphy and *Mr. H. G. Hughes* for the appeal :

The order pronounced by his Honour cannot be supported. At

the Rolls, the bill was treated as one in the nature of a possessory bill, and it was said that the Court, in such *cases, would always interfere by injunction. But this bill, in its present frame, cannot be sustained as a possessory bill, for the averment of a triennial possession, which is material, which is, in point of fact, the only essential characteristic of such a bill, is wanting: *Anon.* (1), *Maple v. Vernon* (2), *Joley v. Stockley* (3), *Biddulph v. Molloy* (4). * * No exclusive occupation of the ferries is shown; and, on the contrary, the defendant by his affidavit swears, that the ferries, now sought to be interfered with, have been enjoyed without disturbance by the plaintiffs, or those under whom they claim, beyond the memory of any person now living. Now, when a right of *this kind, which is analogous to a right of way, subsists, the Court will, after such a lapse of time, presume that there has been the concurrence of the parties, who could confer the right: *Rex v. Barr* (5). * * *

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The *Solicitor-General*, and *Mr. George* for the order :

The bill in this case states a grant from the Corporation of the ferries in question, to William Walsh, whom the plaintiffs now represent. The right of the Corporation to make such a lease cannot be disputed. The letters patent, which are set out in the bill, are distinct and unequivocal, and the right of the Corporation is recognized in the statutes, *17 & 18 Geo. III. c. 10, s. 10, and 32 Geo. III. c. 35. As against this, what right or title has the defendant shown? The action at law appears to be conclusive on that point; Dennis Kenna, who was the defendant in the action, is also a defendant in this suit, and he does not venture to make any affidavit. * * It is said that the plaintiffs have not maintained a sufficient number of boats; but even assuming the fact to be so, which is not the case, such neglect on the part of the plaintiffs will not destroy their right, or authorize such an intrusion on the part of the defendant. In *Peter v. Kendal* (6), Mr. Justice BAYLEY, in reference to an argument of this nature, says, " that mere negligence of the party in whom the ferry is vested does not destroy the right." It is contended that the plaintiffs have lost their right to the injunction by reason of the proceedings at law, which they have recently instituted against the defendant M'Kenna. * * *

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(1) 2 Ves. Sen. 414.

(2) 1 How. Eq. Exch. 316.

(3) 1 Hog. 247.

(4) 2 Ir. Eq. Rep. 228.

(5) 15 R. R. 721 (4 Camp. 16).

(6) 30 R. R. 504 (6 B. & C. 703, 710).

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 c.
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The LORD CHANCELLOR said, that as an ordinary injunction bill, the statement of title contained in it was insufficient; but that if the counsel for the plaintiffs *thought it could be supported as a possessory bill, he would allow the case to stand over to be argued by one counsel at each side, on the question of pleading.

Nov. 30.
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The *Solicitor-General*, on this day, submitted that the allegation in the bill of the proceedings at law was tantamount to a statement of possession.

Mr. J. J. Murphy contended, that this was not sufficient, and that there should be a clear and distinct averment, and that too of actual possession.

Dec. 2.
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THE LORD CHANCELLOR :

The bill in this case, which was filed in June last, does not require an answer. It states the grant from the Crown, and the lease from the Corporation, under which the plaintiffs claim. The lease is stated to be of the said several ferries established and used over the Liffey. It states that Dennis Kenna having been for a considerable time in the constant habit of carrying passengers for hire in boats across the Liffey, and within the said ferries, the plaintiffs brought an action against him in Easter Term, 1841, for a disturbance, and in Hilary Term last, a verdict was found for the plaintiffs. It then charges, that Dennis Kenna, Bernard M'Kenna, and others, are in the daily habit of ferrying passengers for hire across the Liffey within the said ferries. Now upon this bill so framed, the question raised before me is, whether an injunction, which has been obtained against Bernard M'Kenna, can be maintained? It is admitted that the bill in its present shape can only be supported as a possessory bill. In Howard's Exchequer

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the nature of a possessory bill is clearly explained: *it requires to be supported by an affidavit, that the plaintiff has been in the actual, quiet, and peaceable possession of the premises for three years at least before the filing of the bill, saving the disturbances given by the defendant. If there has been a mixed possession, that is partly by the plaintiff, and partly by the defendant, so that it cannot be said that either of the parties had a triennial possession, the parties will be left to settle their rights at law: and it is stated to be generally understood, that the application ought to be made

within a year after the force or fraud committed. These bills have been common in this country, and the like bills may be filed in England (1) ; but in the course of my experience I do not remember such a bill. In refusing the defendant's motion, the bill was treated as a possessory one, and the action was considered as proving the possession. But there does not appear to be such a case stated (and the affidavit, as read to me, was of course an echo of the bill) as brings the bill within the description, to which I have referred. There is no averment or proof of a three years' actual possession ; the action was, no doubt, proof of possession, but the statement of it in the bill did not prove a three years' possession.

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M^r. KENNA.

Now the case so made, and upon which the injunction was obtained, is met by the defendant's affidavit, which introduces new facts of importance. He believes, that the ferries, established at the time the lease was granted, were situate between Carlisle Bridge and Creighton Street ; but that until the recent attempt, the Corporation, or their lessees, never pretended to have any right to ferries situate beyond Creighton Street, on the east part of the river : he then swears, that the ferries sought to be disturbed by the *plaintiffs are not situate within the limits, understood and recognized as the part of the river on which the Corporation had a right to erect ferries, and that he has heard and believes, that the ferries sought to be disturbed have been used and exercised for a period now beyond the memory of any living person, without any interference or disturbance on the part of the Corporation, or any person claiming under that body ; and that the lessee never, during his life, claimed any such right, but confined himself to the ferries within the aforesaid bounds. He then states, that about a year ago, the plaintiffs set up a ferry at a remote part of the east point of the river, in which place no ferry had ever previously existed : he says, he has never interfered with what he admits to be the Corporation ferries. He then states, that the plaintiffs brought an action against himself, and that on the 28th of May he entered an appearance ; that the plaintiffs filed their declaration, and that on the 17th of June he filed his plea : the bill, I think, was filed on the 9th of June, and the conditional *ex parte* injunction obtained on the 16th of June.

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The plaintiffs ought not to have concealed the fact of the second action brought. The MASTER OF THE ROLLS was not aware of that fact, until after he had delivered judgment, and he did not stop the

HEMPHILL action, nor did he intend to do so. But now it is objected, that
 v. the bill cannot support an injunction at all. The case made by the
 M'KENNA. defendant displaces any pretence that the plaintiffs had enjoyed
 three years' undisturbed possession: it was, at most, a mixed
 possession, although within different limits.

[*194] The lease was produced, and it was found to contain powers to
 establish new ferries within the limits of the *charter: but still
 the bill speaks of the plaintiffs' established ferries, as if they covered
 the whole space, whereas it seems plain, that until within a very
 recent period, they ended at a certain spot, beyond which the
 right had long been exercised by others. This is another instance,
 in which the facts were not correctly stated, and they, who come
 for an *ex parte* injunction, must, if they would maintain the in-
 junction, state their case in the first instance fully and fairly. The
 bill, for the reasons which I have stated, cannot, I apprehend, be
 supported; and, therefore, the cause shown must be allowed with
 costs, and the defendant is also to have the costs occasioned by his
 being brought here. I give these costs upon the ground of the
 insufficient statement of the facts on the face of the bill, which has
 led to all the difficulties in the case.

Reverse the Rolls' Order, and let the cause shown against the
 conditional order, bearing date the 16th of June last, be allowed
 with costs, including the costs of this application. Deposit to be
 returned to defendant's solicitor.—Reg. Lib. 1842, fol. 161.

1842.
 May 27.
 1843.
 Jan. 19

THE ATTORNEY-GENERAL v. THE CORPORATION OF CASHEL, WILLIAM PENNEFATHER, AND OTHERS.

(3 Dr. & War. 294—316; S. C. 2 Con. & L. 1.)

SIR EDWARD
 SUGDEN,
 L.C.
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In 1230, M., Archbishop of Cashel, with the consent of the Dean and
 Chapter, granted to the Corporation of Cashel, the town of Cashel; and also
 granted to the said Corporation and their tenants, and all inhabitants of the
 said town, free pasture in all his lands, except meadows, &c. Subsequently
 the Corporation became seised in fee of the soil of the lands, over which free
 pasture had been so granted. There was not any evidence to show the
 time, or the manner, in which the Corporation became seised of the soil:
 Held, that inasmuch as the old right of pasturage in the lands of the
 Corporation was affected with a trust for the benefit of the inhabitants of
 Cashel, so the soil of the lands, which were substituted for that right, was
 bound by the same trust, and that whether the new right was acquired by
 usurpation or otherwise.

A lease for a term of ninety-nine years, made by the Corporation, to one

of their own body, at a gross undervalue, was set aside with costs, the lessee was ordered to account for the rents and profits since the date of the lease, 1830, and it was referred to the Master to approve of a scheme for the application of the rents.

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To prove the grant of 1230, by M., an attested copy of an enrolment of a charter of confirmation by Roland, a subsequent Archbishop of Cashel, found amongst the Parliamentary Rolls, in the Rolls' Office, and which contained an *inseparimus* of the charter of grant by M., was admitted as good secondary evidence.

THIS was an information by the *Attorney-General*, at the relation of two citizens of Cashel, against the Corporation of Cashel, a person named William Pennefather, and several others. The suit was instituted for the purpose of setting aside a lease of the 18th of September, 1830, of some of the Corporation lands, which had been executed to Richard Pennefather, under whom the defendant, William Pennefather, derived.

The original information was filed on the 20th of June, 1832, and the amended information on the 10th of April, 1837, and it stated, that the town and Corporation of Cashel had existed from time immemorial. That in the year 1230, Maurianus, Archbishop of Cashel, being seised in frankalmoign of the town of Cashel, under letters patent of Henry III., by charter bearing date the 12th of July in the 14th year of his reign, with the consent of the Dean and Chapter, granted to the Provost and Burgesses of Cashel, and their successors for ever, the said town, excepting *and reserving to himself the bakery and shambles; and also granted to the said Provost and Burgesses, and their successors, to their tenants, and all inhabitants of the said town and burgagery thereof, free pasture in all his lands, except meadows, corn lands, and manors; and also authority to hold a hundred, and court baron, reserving out of said town and pastures, a chief rent of nine marks, and out of the hundred and court baron, one mark.

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The amended information further stated, that by charter, dated the 19th of October, 1557, Roland, then Archbishop of Cashel, having inspected the charter of Maurianus, with the consent of the Dean and Chapter, confirmed the said grant of Maurianus, and that under said charters, the said Provost and Burgesses were seised of those lands and pasturage, in trust for the purposes therein expressed.

That by charter of the 3rd of October, in the 13th year of Charles I., the inhabitants of Cashel were incorporated, by the name of the Mayor, Aldermen, Bailiffs, Citizens, and Commons of the city of Cashel. That by another charter bearing date the 22nd

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of June, in the 15th year of the same reign, King Charles, in consideration of 100s. confirmed the rights and jurisdiction of the city, defined its boundaries, and empowered it, by its said corporate name, to acquire and possess, and to grant and demise, &c., property of what kind soever: and that this charter also granted to the said Corporation, in lieu of its ancient license to take lands in mortmain to the value of 30*l.* per annum, license to the extent of 50*l.* per annum. This charter did not mention the charters of Maurianus and Roland above mentioned.

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The information then stated, that in, and previous to *the year 1829, the Corporation was seised of a large tract of land, in and near the city, part of the lands held under the said charter of Maurianus, and which, if properly administered, would produce more than 2,000*l.* per annum; and the information charged, that the said Corporation held the same upon trust for charitable uses, and that according to the true intent and meaning of the charter of Maurianus, the said Corporation was bound to make the said lands as productive as possible, and to apply the rents and profits thereof for the improvement and benefit of the city of Cashel, and its inhabitants and sojourners. That the Corporation had not made said lands productive, but, on the contrary, had demised the greater part thereof to members of their own body, for long terms of years; and that the entire rental thereof in 1837, only amounted to 219*l.* 18*s.* 10½*d.*, by reason whereof said city had fallen greatly into decay.

The information stated, that the said rental of 219*l.* 18*s.* 10½*d.*, had been applied to the payment of officers, and the repair of the market-house and streets, &c. That a considerable tract of the said lands so granted by Archbishop Maurianus, was called Cottyn, or, “the commons of Cashel.” That in 1792, a lease of 1,264 acres of said Cottyn had been granted by the Corporation to Richard Buckworth, for a term of ninety-nine years, reserving a rent of 87*l.* 6*s.* 6*d.*, at a fine of 200*l.* That in the year 1827, Mr. Bolton, in whom the said lease was then vested, applied to Richard Pennefather, one of the aldermen, and the patron and treasurer of said Corporation, and offered 10,000*l.* for a renewal of said lease, that this offer was declined, and that thereupon Mr. Bolton’s agent intimated that a considerably larger sum would be given, but that

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Pennefather *broke off the negotiation. That in 1829, when the said lease was within one year of its expiration, the said Alderman Pennefather purchased Bolton’s interest for the sum of 2,500*l.*;

Bolton's rental, arising from subleases, at that time being 1,550*l.* per annum, and considerable arrears being due to him.

The information then stated, that on the 29th of June, 1830, without any inquiry upon the subject, an order was made at a board of aldermen, that a new lease of said lands, together with an additional parcel, should be made to the said Richard Pennefather for a term of ninety-nine years, at a rent of 93*l.* 11*s.* 9*d.* That said Richard Pennefather was present at the board, when said order was made, and that it was his duty, as treasurer, to have informed the Corporation of the true value of said lands. That all the other aldermen of Cashel, at the time this order was made, were nearly connected with Richard Pennefather, either by consanguinity or affinity, and that pursuant to said order, a lease dated the 13th of September, 1830, was duly executed to the said Richard Pennefather, and that no fine was paid.

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The information then stated, as evidence that the said lease was a breach of trust on the part of the Corporation, the oath of office which the charter of the 13th of Charles I. prescribed should be taken by the Mayor. This oath contained the following clause: "You shall procure such things to be done, as may honestly and justly be to the profit and commodity of this city and Corporation; and shall not consent to pass any estate of inheritance in mortgage, or otherwise, in the common lands of Cashel, called the Cottyn, or any part or parcel of the same whatsoever, during *your office, and you shall not give any way, nor consent that any assignment shall be made of or for any rent, that now is, or hereafter shall be, issuing out of the said Cottyn or any part thereof, unto any manner of person or persons whatsoever, for longer time than one year, unless it be for the redemption or acquittal of some part of the lands that be in mortgage from this city."

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The information then stated, that Alderman Pennefather died in the year 1831, having bequeathed his interest in said lease to his son, the defendant, William Pennefather, who, at the time the lease was granted, was Mayor of Cashel, and had himself executed the lease as a granting party, representing the Corporation. The information prayed, that the said lease of the 13th of September, 1830, might be declared fraudulent and void, and contrary to the trusts reposed in the Corporation.

The defendant, William Pennefather, having, by his answer, stated a settlement of 1835, affecting the said lease; a further amended information was filed on the 30th of January, 1838,

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bringing before the Court the parties interested under that settlement.

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The defendant, William Pennefather, by his answer stated that he did not believe that the Corporation of Cashel ever took any estate in the lands in question under or by virtue of the said charter of Maurianus; that if such charter ever existed, it was a mere device to give colour to usurpation by the Archbishop over the town of Cashel; and that from time immemorial, prior to the date of the said alleged charter, the city of Cashel was seised in absolute dominion, unfettered by any trust, of the lands mentioned *in said charter. The said defendant further stated, that no part of the rent purporting to be reserved by the alleged charter was ever paid by the city of Cashel; and that the Corporation did not claim title under or in any way accept the charter of Roland above mentioned. The answer then stated a charter of the 10th of February, 1586, by which Queen Elizabeth granted to the Corporation of Cashel the power of acquiring lands to the value of 30*l.* per annum, notwithstanding the Statutes of Mortmain, and alleged that this was the license mentioned in the charter of Charles. The answer then denied that the Cottyn was part of the lands, the pasturage of which was granted by the charter of Maurianus. The statements of the bill relative to the value of the land, and the granting of the lease to Richard Pennefather, and his connexion with and influence over the Corporation were not controverted, but the defendant alleged that the rent reserved by that lease was quite sufficient for all corporate purposes.

The charter by which Henry the Third granted the town of Cashel to Maurianus, as recited in an indictment on the Plea Roll of the 21st of Edward III., was read in these terms: " Henry, &c. Know ye that we, &c. have remitted and quitted claim, for us and our heirs for ever, to Father Maurianus, Archbishop of Cashel, and his successors, the contention and claim which we had moved against the said Archbishop upon the new town of Cashel: and we have granted the same town, with its appurtenances, henceforth of us and our heirs, to hold to the said Archbishop and his successors in free, pure, and perpetual alms, free from all exaction and secular service," &c.

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On the part of the relators it was then proposed to read, *as evidence of the grant by Maurianus, an attested copy of an enrolment of the charter of Archbishop Roland, which contained an *inspeximus* of that grant, and was discovered amongst the Parlia-

mentary Rolls. The proper searches were proved to have been made for the original, which could not be found.

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Mr. Serjt. Warren and *Mr. Moore* against the admission of the evidence. * * *

The Attorney-General, and *Mr. Serjt. Greene*, *contra*.

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THE LORD CHANCELLOR :

I shall reserve this point, admitting the document in evidence *de bene esse*. I should have thought, however, there was not any great difficulty in the question. There is clear evidence that Archbishop Maurianus had the soil of the city vested in him ; and then this instrument, executed by Archbishop Roland, of which the enrolment is lodged in the Rolls' Office, is offered in evidence. This document purports to be a confirmation of a grant from Maurianus, of which it contains an *inspeximus* ; from the *inspeximus* it appears that this grant was from Maurianus, of the soil of the city, and of a certain right of pasture. The Archbishop, his successor, by an instrument upon record, confirms the grant of his predecessor, with the same reservations as in the original grant, and amongst others, one of a rent of nine marks per annum, which, it is alleged, has never been paid. It is contended, that this does not constitute legal evidence of the grant from Maurianus. The proper searches, however, for the original of that grant have been proved, and the question is, whether a grant by one Archbishop, reciting a grant by his predecessor, which he confirms, is evidence of that grant ? The whole fee was in Maurianus ; the grant could not have been made without the concurrence of the Dean and Chapter ; their consent is alleged, and the proper solemnities are stated. I am disposed to think that this is good secondary evidence of the predecessor's grant. If the original of Roland's charter was here, I should consider it good evidence of the former charter.

But then, it is said, this enrolment is not itself admissible, as evidence of the second charter. No doubt, strictly speaking, it is not evidence as a record ; but when the immense power of Archbishops in ancient times is considered, no one can feel surprised at the place in which it is found ; and although the Rolls' Office is not the proper custody, still the instrument is not the worse for being found there. A draft of a deed, even instructions for the preparation of a deed, may be received as secondary evidence of

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the contents of that deed. I think this enrolment, which was deposited centuries ago in a place of security, where there was an officer, whose especial duty it was to take care of documents lodged in the office, is proper secondary evidence.

But a third difficulty has been suggested to my reception of this evidence, namely, that if the deed itself was here, it would be inadmissible in evidence, as against the defendants, because no connexion is shown to have existed between this grant and the Corporation; that there is not any proof that the deed was ever acted on by the Corporation; and that it is now tendered in evidence against an adverse party, who altogether denies claim under it. But how does this matter really stand? The soil of the city is distinctly proved to have been vested in Maurianus; the object of the party is to show how the property passed into the hands of the Corporation, out of the Archbishop. The parties claiming under the Corporation do not pretend to explain the matter; they merely say, we claim the property, not under the Archbishop's grant. Is there then nothing to connect the defendants with that deed? It is true that no payment of rent under it has been proved, but the property, which was in the Archbishop is now found vested in the defendants; they can only have got it through the Archbishop. [*303] *If, therefore, there is secondary evidence of a grant by the Archbishop, must I not connect the defendants with that grant? It is the only title which has been produced.

But the case does not rest there; the grant by Roland appears to have been produced at a trial, and acted upon by a verdict. And then there is the oath of the Mayor, not to alienate this property, which is described precisely as in the original grant. In the case of *Lancum v. Lovell* (1), the grant was *from*, and not, as here, *to* a Corporation.

In stating these considerations, I have satisfied my own mind upon the point. I now entertain no doubt, and admit the evidence absolutely.

The part of this *inspezimus* which related to the grant of pasture was in the following terms: "Likewise, we have also given, &c. to the said Provost and Burgesses who now are, and who for the time shall be, for ever, free pasture for all and every of the animals of them and their tenants whomsoever, and of all persons inhabiting and sojourning in the said town and the burgage thereof, in all our

lands, except meadows, standing corn lands, and manors:" the charter did not grant any land except the soil of the city itself.

The charter of the 15th of Charles I. was also read. In addition to the contents already mentioned, as stated in *the information, this charter contained grants of certain privileges to hold courts leet and courts baron, and various fairs and markets, and declared that the mayor, aldermen, &c. and their successors should "have and perceive to their own proper use all and singular perquisites, profits, commodities and emoluments, tolls, customs, and other profits, &c. issuing, &c. out of or in such fairs and courts."

Some extracts from the books of the Corporation were also read in evidence, to show the application of the funds of the Corporation, until the year 1741, to the benefit of the town of Cashel. The latest entry, which was in the year 1741, was of a fee of 10*l.* paid to a physician for attending the sick poor of Cashel.

No evidence was offered of payment at any period of the rents reserved in the charter of Archbishop Maurianus. An extract from the Down Survey was read, from which it appeared that at the time that survey was made, the Cottyn was common land; and also some old leases were put in, which showed the practice of the Corporation, to let their land for long terms of years at nominal rents.

The *Attorney-General*, Mr. Serjt. Greene, Mr. Monahan, and Mr. Hanna, for the information. * * *

Mr. Serjt. Warren, Mr. Moore, Mr. Brewster, Mr. Dickson, and Mr. Mansergh, for the defendant, William Pennefather:

The question is simply whether the lands comprised in the lease of 1830 were affected with a trust in the hands of the Corporation. The information describes the Corporation as existing from time immemorial: it is submitted that their seisin of Cottyn was coeval, and must also be referred to time immemorial. No land, except the soil of the city, was comprised either in the grant of Henry III. to Maurianus, or that of Maurianus to the Corporation. *There is no evidence whatsoever to show that the Cottyn was ever the property of the Archbishop: there is none, that it was the land over which he granted, or assumed to grant, a right of commonage; every presumption is the other way. * * *

(THE LORD CHANCELLOR: Suppose the lands were derived from some other source, unfettered with any trust, and that the

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Corporation accepted this charter of Charles, can it be argued that the restrictions of the oath are not binding?)

* * Here, if there be not a trust, the utmost that can be said of the lease is, that it was a misapplication of Corporation property. *The Mayor of Colchester v. Lowten* (1) is to the same effect.

Mr. Doheny and Mr. Hughes, for other parties.

Mr. Monahan, in reply.

May 27.

THE LORD CHANCELLOR :

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This case has been fully argued, but I do not mean to dispose finally of it at present. It may be a question of some difficulty to determine whether this property was comprised in the grant from Archbishop Maurianus to the Corporation of Cashel; but looking at the original grant from the Crown to Maurianus, I do not know that I may not suppose that the commons, which probably were of inconsiderable value at the time, were included in it. It might not be difficult to hold, that under the grant of the **“town with its appurtenances,”* these commons, which immediately adjoined the town, would pass. But, however the Archbishop may have acquired lands in this place, it is clearly proved that he granted the town to the Corporation, and also free pasturage over all his lands. I think the fair construction of this is, what has been suggested, that the Corporation were to enjoy free pasturage over all his lands, which from time to time should remain in pasturage, but that the Archbishop was not to be restricted in treating the lands as he chose. The proofs which have been read do not show what the lands were, over which this right of pasturage was to be enjoyed, or that this right was ever enjoyed. There is not any positive proof that the lands in question did in fact ever belong to the See; neither is there any proof of payment of the reserved rents, of the one mark, or of the nine marks; but the inference attempted to be drawn from the want of proof of such payment is clearly carried too far, for there is property, which the Corporation at present enjoys, for instance, the franchise, &c., in respect of which rents were also reserved, yet it does not appear that those rents have ever been paid. This observation, therefore, removes the effect of the argument derived from the circumstance of the non-payment of rent.

(1) 12 R. R. 216 (1 V. & B. 226).

By the Down Survey, which was made in 1666, it appears that these lands were then called the Commons of Cashel, and also by an Irish name, which, as it has been explained to me, means Commons. Now this goes to prove that this was common land, and as we all know how lands became common, it is not probable that any other person than the Crown or the Archbishop, or some other great lord, could have had the soil of these lands; and as *no other person seems to have intervened here, there is a strong presumption that these lands belonged to the lord of the soil of the town, at the gates of which they lay. Now before the charter of Charles, the Corporation were in possession of the commons of Cashel. It is then said, and with some appearance of reason, that the Corporation being found in possession of the land as their own soil, and having had pasturage granted to them over the lands adjoining the town, it must be considered as pasturage, which would be useful to the inhabitants of the town, and that in the absence of evidence of any other property being enjoyed by the Corporation, it must be presumed that these commons were the property, the right of pasturage over which was granted by the Archbishop. Supposing then the fair presumption to be, that the lands in question in this cause are those, over which the right of pasturage was granted, what is the rule of law? Clearly this, that if a trust attached to the right of pasturage in the hands of the Corporation, in lieu of which right the soil of the lands has in some manner been substituted, those, who would have been entitled to participate in the benefit of the former trust, will now be entitled to share in the advantages of that, which has, by substitution, become liable to the trust. For what is the right of pasturage over certain lands? It is the right of eating, by the mouths of your cattle, the produce of those lands; the gift of the land itself merely confers an additional and more extended right over the same soil, which must be bound by the original trust. It is the same thing if the right to the lands was acquired by usurpation. In cases of encroachments made by tenants, the point has been decided different ways by different Judges. But I believe the better opinion to be, that if a tenant commits an encroachment, the landlord, on the expiration of the *term, will be entitled to the benefit of the encroachment. It is certainly a strong measure to make the landlord a trespasser by the act of his tenant; but such, I apprehend, is the law. This principle, by analogy, supports my view of the law of this case.

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But the case does not stop here. By the charter of Charles, grants were made of fairs, markets, &c., to the Corporation, expressly for their own absolute use; but certain restrictions were imposed, as to the mode of dealing with the commons. It was suggested, that there was no power to require this oath; but *Mr. Serjt. Warren* admitted, with that candour which is always creditable to the counsel, and never injurious to the client, that acceptance of this charter rendered binding upon the Corporation the restriction of the oath, which it imposed. But then it was said, that the object of this oath was the benefit of the members of the Corporation *inter se*, and that as the *Attorney-General* had no right to pry into the affairs of the Corporation, unless some trust attached to its property, the Court could not interfere on this information. But looking at the terms of this oath, and particularly in connexion with the frame of the charter, how can it be alleged that its object was to prevent alienation, merely with a view to the benefit of the Corporation itself? If this had been the intention of the Crown, might we not have expected to find the restriction annexed to the property—the tolls and customs—which the Crown itself was granting? The charter assumes this singular shape, that whilst the Crown, for the first time, grants the tolls and customs, and might, therefore, have imposed any restriction it thought proper on the mode of enjoyment of them, it yet places the restrictions on the mode of dealing with the commons, of which the Corporation were then in possession. It is true, there is *not upon the face of the charter a word pointing expressly to a trust. On the other hand, what is the meaning of the oath? “You shall not consent to pass any estate of inheritance in mortgage, or otherwise, in the common lands of Cashel, called Cottyn.” This is a clear prohibition against any alienation of the lands themselves. The oath then proceeds: “You shall not give any way, nor consent that any assignment shall be made of or for any rent, that now is, or hereafter shall be, issuing out of the said Cottyn.” It is difficult to imagine a prohibition more clear, or more stringent, against any alienation of the beneficial interest in this property. It says, you are neither to alien the inheritance, nor any rent issuing out of the land. A restriction might be expressed in larger words, such as a conveyancer would probably use; but you could not frame any thing more explicit, or more stringent. What sense am I then to attach to this oath? Why was it annexed to the mode of dealing with the commons? Why was it not annexed to the new grant

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of the franchise? What could have been the reason of this distinction, unless it were, that there was an already existing liability affecting the lands, the former property of the Corporation? The meaning seems to be this; as to the new grant, the Crown did not wish to impose any restriction, but the Crown did mean to impose an oath to perform the corporate duties; not only the general duties, as members of a Corporation, but also those, which related to the lands intrusted to their care. Counsel have not attempted to explain the use of this oath, unless there was an antecedent trust. There is nothing to repel this presumption; therefore, if there was nothing more in the case, and I were to act the part both of Judge and jury, weighing the facts upon my oath, and applying to those facts the law, I should, upon the evidence which has been *offered, be of opinion that the land, by way of substitution, was bound by a trust.

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But there is no evidence to show that this land ever belonged to Archbishop Maurianus; it rests wholly upon presumption; neither is there any statement of what the amount of the property of the Corporation was, or how it was disposed of, for what purposes, at any given period. What I am disposed to do is this, if the defendants desire it, I will direct an issue to inquire, whether the lands called the commons of Cashel were the lands, over which the right of pasturage was granted. I do not press the defendants to take this issue; and their counsel should be aware of what, upon the return of the inquiry, my ultimate decision would probably be. If the issue is found in favour of the defendants, they will then have only to deal with the difficulties arising from the charter of Charles the First; but if the issue is found the other way, there will be at once a decree against them. Supposing the lands not to have been the lands of the Archbishop, the question will then arise, whether the charter of Charles did not bind them with something in the nature of a charitable trust, which the oath did not define, because it previously existed.

Upon the last point in the case, it is scarcely necessary to observe, that if the lands were affected by a charitable trust, this lease must be set aside. The right of the wife cannot rest upon a better foundation than that of her husband, for the settlement, by which the jointure was charged upon these lands, was made *pendente lite*.

The defendants elected to take an issue, which was accordingly directed.

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A feigned action was thereupon brought in the Court of Common Pleas, and two issues were raised; the first, whether the lands mentioned in the pleadings, and comprised in the lease of the 13th of September, 1830, were those, over which a right of pasturage had been granted by Archbishop Maurianus, or any part thereof; and secondly, if not so, whether the said lands came to the Corporation in lieu of those, over which the right of pasture had been granted. The action was tried before the Lord Chief Justice of the Common Pleas, in the month of December, 1842, and the jury found a verdict in the affirmative on the first issue.

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The case now came on to be heard upon the finding of the jury, and the only questions to be disposed of related to the period, from which the amount of mesne rates was to be directed against the defendant, Mr. Pennefather, and the costs of the cause.

The *Attorney-General* and *Mr. Serjt. Stock* appeared for the relators.

Mr. Serjt. Warren and *Mr. Moore* for the defendant, Mr. Pennefather.

THE LORD CHANCELLOR :

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I have been furnished with a note of my judgment on the former hearing, and I find that I not only thought, as has been established by the verdict of the jury, that the lands included in the lease were part of the lands, over which the right of pasture extended, but that independently of that, the restrictions imposed by the charter of Charles the First, *led to the irresistible inference, that the property in question was subject to certain trusts, and that the right of the *Attorney-General* would be established; and so it has turned out.

The questions now before me are, first, as to the time from which the account of mesne rates is to be directed, and, secondly, the costs of the suit. The lease in question was executed in the year 1830, to Mr. Pennefather, before the old lease had expired, and just after the Mayor had taken the oath, which bound him, at least with respect to these lands, and ought to have led to an inquiry, the result of which must have been the discovery of the documents, which would have shown a dedication of the land to the benefit of the town.

I do not dispute, that if this were mere corporate property, the *Attorney-General* would have had no right to have filed the present

information, or instituted any inquiry into the mode of its management. Still it never could be said that the application, which has taken place in the present case, was a proper one. Corporate property should be applied to the purposes of the Corporation. In a moral point of view, no doubt, there is a very good excuse for the misappropriation of this property, arising from the long established custom of granting such leases to private persons. But this is a consideration with which I have nothing to do at present, for it now turns out that this property is dedicated to charitable purposes; the Mayor, who was bound by the oath to which I referred on the former occasion, is the person who obtains the lease, and in the year 1832, within two years after the commencement of the lease, the present information was filed. I am asked not to carry *the account farther back than the filing of the amended information in 1837, first, upon the merits, and secondly, upon the frame of the proceedings. As to merits, I cannot discover any; this gentleman paid nothing for his lease; he took it for his own private purposes; both at the hearing in this Court, and before the jury in the court of law, he insisted upon his own title, and resisted the right of the *Attorney-General*. The suit was an adverse one, and the defendant's case throughout was, that he had done nothing wrong. The very contest shows the honesty of his defence. But the defence has failed. The rents and profits must go to the real owner. I am here to execute justice between the parties, and I cannot think it would be just to give to this gentleman what is the property of others.

With respect to the frame of the proceedings, it was said that Mr. Pennefather was no party individually to the original information, that in fact it did not refer to him; the prayer of the original information was read, and it asks for an inquiry with respect to all leases, showing distinctly that proceedings were at that time contemplated. How is it then possible to suppose, that the defendant was not aware that his title would be impeached?

On the whole, then, I apprehend, that it is a matter of course to charge this defendant with the rents and profits from the year 1830, the period of the commencement of the lease. It is true that this Court is always unwilling to direct an account for any great length of time; but that is only in cases, where the funds have been supposed to belong to the person holding them, or where, although the parties have acted erroneously, still their conduct has not *been corrupt. Speaking from recollection, I think Lord

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ELDON, in *The Attorney-General v. Mayor of Exeter* (1), laid down the principles which should govern the Court, and upon which I shall always be ready to act.

Then as to the costs, the suit was rendered necessary by the misapplication of the trust fund. The documents, which proved the misapplication, were in the possession of the Corporation, of which the defendant was a member. Who then ought to pay the costs? I cannot throw their payment upon the estate, which has been too long withheld from its rightful application. To do so, would be to hold out an encouragement to persons to retain estates, which do not belong to them. The costs must, therefore, abide the result of the suit. If the defendant had succeeded, he would have been entitled to the costs of the suit. He has failed, and failing, he must pay the costs. I must declare the lease to be an improper one, and direct it to be set aside. I must also direct an account from the commencement of the lease until the present time, with all just and fair allowances. The defendant, Mr. Pennefather, must pay all the costs of the *Attorney-General* and the relators. The Corporation are to bear their own costs, and there must be a reference to the Master to approve of a scheme for the application of the rents of the estate.

HAY v. WATKINS.

(3 Dr. & War. 339—343; S. C. 5 Ir. Eq. R. 273.)

1843.
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By a marriage settlement, a sum of 2,000*l.* was provided for the portions of the younger children of the marriage, to be divided amongst them in such proportions, as the father should, by deed or will, direct: and, in default of appointment, equally. The father, by his will, after reciting his power, bequeathed as follows: "I leave and bequeath unto my said daughter Harriett a further sum of 200*l.*, to have me properly buried in this island, and to pay what small debts I may owe in this island at my decease": Held, that this appointment was bad, and that the 200*l.* should go as if unappointed.

THIS case came before the Court upon exceptions to the Master's report.

It appeared that by indenture of settlement, bearing date the 10th of December, 1783, and made between John Watkins of the first part, the Right Hon. St. Leger Lord Doneraile and the Hon. Mary St. Leger, his daughter, of the second part, Boyle Aldworth, and the Hon. Richard St. Leger, of the third part, and the Hon.

Hayes St. Leger and Richard Aldworth of the fourth part; and being the settlement executed on the occasion of the marriage of John Watkins with the Hon. Mary St. Leger, certain estates, situate in the county of Cork, of which the said John Watkins were seised, were vested in trustees for the term of five hundred years, upon trust, in the events which have happened, to raise a sum of 2,000*l.* of the then currency, for the portions of the younger children of the marriage, to be divided amongst them in such parts and proportions, and to be paid at such time as the said John Watkins, by any writing under his hand and seal, or by his last will and testament, should direct or appoint: and in default of such appointment, to be equally divided between them, share and share alike, and to be paid at the times therein specified.

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There were issue of the marriage seven children; and upon the marriage of one of them, Harriett Charlotte, with James Hay in the year 1821, John Watkins, by a certain writing under his hand, and attested by two witnesses, and bearing date the 1st of December, 1821, undertook, *notwithstanding any deed or letter to the contrary, to leave at his death 500*l.* late currency, and during his life to pay the sum of 30*l.* annually, to the said Harriett Charlotte Watkins, as interest thereon.

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On the 15th of August, 1833, John Watkins, who, up to the period of his death, had resided in the Isle of Man, departed this life, having previously made his will, bearing date the 4th of July, 1832, and thereby, after reciting the marriage settlement of the 10th of December, 1788, and the power of appointment which he had thereunder, he proceeded thus: "Whereas on my daughter's (Harriett's) marriage with Captain James Hay I settled the sum of 500*l.* on her, to be paid at my death, and for which I have paid her the legal interest yearly: I further leave and bequeath unto my said daughter Harriett a further sum of 200*l.* to have me properly buried in this island, and to pay what small debts I may owe in this island at my decease: I also leave and bequeath unto my daughter, Louisa Watkins, the sum of 900*l.*, to whom I never gave anything on her marriage, or since: the remaining 400*l.* I leave and bequeath unto my four sons in the East Indies, being amply provided for, that is to say, 100*l.* to my son John, 100*l.* to my son Arthur, 100*l.* to my son Westropp, and 100*l.* to my son William."

The bill in the present cause was filed by James Hay, and Harriett Charlotte his wife, and Westropp Watkins, and Louisa Watkins his wife, praying that the appointment made by John

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Watkins in favour of his younger children, might be declared valid, and the charges raised.

On the 16th of December, 1841, a decretal order was *pronounced, declaring the said sum of 2,000*l.* to be well charged on the lands and premises in the pleadings mentioned, and referring it to the Master to inquire and report the several parties then entitled thereto, and their rights, and their several shares therein respectively.

On the 19th of December, 1842, the Master made his report, and thereby found that the plaintiff, Harriett Charlottè Hay, was entitled to both sums of 500*l.* and 200*l.*

To this report exceptions were taken on the part of some of the younger children, who submitted that the appointment, so far as regarded the sum of 200*l.*, was void, and that this sum was therefore distributable as an unappointed portion of the 2,000*l.*

Mr. Moore and Mr. Joshua Clarke for the exceptions. * * *

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Mr. Serjt. Warren, Mr. Collins, and Mr. Radcliff, for the Master's report :

It is quite clear that the testator had no power to annex to the payment of the share, which he has thought proper to appoint, the condition in question : the condition, therefore, is void, while, at the same time, the appointment is valid. The cases establish that where a condition is annexed to a gift, not authorized by the power, the gift is good, and the condition only inoperative, so that the appointee takes the fund absolutely : *Alexander v. Alexander* (1), *Sadler v. Pratt* (2). The Court always struggles to support the appointment, unless where there has been any underhand or fraudulent agreement, in which case the corrupt agreement vitiates the entire transaction, and renders it void *in toto* : *Robinson v. Hardcastle* (3). * * *

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THE LORD CHANCELLOR :

This case is not free from difficulty : what was intended appears to be quite clear. The object of the gift was not a mere bounty to the testator's daughter, but a something more, a payment of the testator's small debts. The cases go to this extent ; that where the intention to benefit the object of the power is clear, and that something is superadded, a condition annexed to the gift not

(1) 2 Ves. Sen. 640.

(3) 1 R. R. 467 (2 T. R. 241).

(2) 35 R. R. 102 (5 Sim. 632).

warranted by the power, there the gift is good; the Court will strike out what is excessive, and the appointee will take the fund absolutely: but, in this case, the benefit was intended to be given to the daughter, upon condition of her complying with the terms, which the donee of the power imposed, namely, the having him properly buried, and paying what small debts he might owe at his decease. Can it be argued, that it was intended that this lady was to take this sum of 200*l.*, and comply with neither of the conditions? That, however, may be said of every such case; but still further, here it is difficult to separate the gift from the condition, they constitute an entire gift: the words are, "I bequeath unto my daughter Harriett a further sum of 200*l.*, to have me properly buried in this island, and to pay what small debts I may owe in this island at my decease." It is like the case of a legacy, where there is no gift except in the direction to pay. I cannot separate the gift from the condition, and therefore must hold the appointment to be bad. I believe this to be the soundest construction, although I do not think the case free from difficulty. I allow the exceptions.

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CROZIER v. CROZIER, No. 1.

(3 Dr. & War. 353—388; S. C. 5 Ir. Eq. R. 540.)

1843.
Jan. 17, 26,
27.

By deed, certain lands were conveyed to the use of A. for life, and from and after his decease unto and to the use of, and to and amongst such one or more of the child or children of A., by his then wife, as he should by deed or will limit and appoint, and to the heirs and assigns of such child or children, and for default of such appointment, to the children as tenants in common in fee; and for default of such issue, to A. in fee.

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A., by his will, without referring to the power, devised the lands to his wife for life, upon condition that she should thereout maintain and educate his children, in such manner as his executors should think proper; and he directed that at the end of each year an account should be settled, and that whatever sum should be found in her hands should be placed out at interest, for the purpose of accumulating a fund for the payment of the legacies thereafter bequeathed. The testator then bequeathed to each of his younger children 500*l.*, and devised the lands to his eldest son for life, and after his decease to his heirs male and female; and directed that in case the accumulated fund should not be sufficient for the payment of the legacies to the younger children, the said lands, together with certain other lands which were not the subject of the power, should stand charged with the deficiency: Held, that the devise to the eldest son in fee in remainder was a good appointment under the power, although the gift to the wife was void.

Held also, that the direction for the maintenance and education of the younger children, and the gift of the legacies to them were, *pro tanto*, a due execution of the power; but that the gift of so much of the rents as during the life of the wife was not required for the maintenance of the children,

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and the payment of their legacies, was void, and therefore went as in default of appointment.

A power to give the estate authorizes, in equity, a sale and a gift of the produce of the estate.

A power must not be exceeded, nor its directions evaded; but where there is no prohibition, every thing, which is legal and within the limits of the authority, should be supported.

There ought not to be any trifling distinctions between power and property upon merely technical grounds.

By indenture bearing date the 22nd of December, 1797, John Rosborough released and demised the lands of Gortra, in the county of Fermanagh (of which he was then seised in fee-simple), to John Crozier, his heirs and assigns, to the use of John Crozier for life, without impeachment of waste, "and from and after his decease then unto and to the use of, and to and amongst such one or more of the child or children of the said John Crozier by Katherine Crozier, otherwise Rosborough, his present wife, niece of the said John Rosborough, whether son or sons, daughter or daughters, as the said John Crozier, by any deed executed in his life-time, or by his last will and testament, by him duly executed, shall limit and appoint, and to the heirs and assigns of such child or children for ever: and in default of such appointment, then to the use and behoof of the several children of the said John Crozier by the said
[*354] *Katherine Crozier his wife, whether they be sons or daughters, or both, and their several and respective heirs and assigns, to take as tenants in common and not as joint-tenants, and if there shall be one child, then to such only child, whether son or daughter, his or her heirs and assigns; and for default of such issue, then to the use and behoof of the said John Crozier, his heirs and assigns for ever," subject, however, to a rent of 48*l.* per annum, to be paid to John Rosborough for his life, and after his decease, to a rent of 24*l.* per annum to his heirs and assigns.

Immediately after the execution of this deed, John Crozier entered into and continued in possession of the lands of Gortra until his decease on the 29th of January, 1814.

John Crozier made his will, dated the 22nd of June, 1806: the part of it material to the present case was as follows: viz., "First, I order that all my just debts shall be paid immediately after my decease. I leave and bequeath unto my beloved wife, Katherine Crozier, the lands of Gortra, during the term of her natural life. I also bequeath to her, the rents, issues, and profits, arising out of my lands of Moorefield, otherwise Cavanteely, Cormick, Crockans, and Coagh, situate in the county of Fermanagh aforesaid, to take

and receive the same, until my son John shall attain the age of twenty-three years, subject nevertheless, and upon the express conditions hereinafter mentioned, that is to say, that she shall, out of the rents and profits arising out of the said lands, maintain, support, and educate, the several children, the issue of her and my marriage, that shall be living at the time of my decease, in such a manner as my executors, hereinafter named, shall think fit and direct; and that after all necessary expenses shall be paid by *her for their education and support, then my will is, that at the end of each year, a regular account shall be stated and settled by her, and my other executors; and that whatever sum there may appear to be in her hands, shall be lent out at interest, for the purpose of accumulating a fund to enable my executors to pay off the several legacies, at the certain times hereinafter for that purpose mentioned.

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“And my will is, and I hereby order and direct, that in order to accumulate a further sum for the payment of the aforesaid legacies, that my executors shall, immediately after my decease, collect and receive half-yearly the rents, issues, and profits, arising out of the lands of Derrikerb, Drumsastry, and Cornavray, and shall immediately upon receiving the same, lend it out at interest for the purpose aforesaid: the legacies in which the above-mentioned fund is to be raised in discharge, are as follows: I leave and bequeath unto my younger children, namely, Thomas, Francis, Robert, Mary, Margaret, Rosborough, and William, the sum of 500*l.* sterling, each, to be paid to them respectively, upon their attaining their respective ages of twenty-one years, or being married with the consent of my executors, whichever shall first happen after my decease; and in case any of my said several children shall die before they attain the age of twenty-one years, or being married as aforesaid, my will is, that then the sum of 500*l.* sterling, which he or she, as the case may be, would be entitled to, shall go to and amongst my other six children, share and share alike, and in case more than one should die, in like manner so to continue on in proportion, and in like manner as the first, their fortune to go to the survivors.

“I give and devise to my eldest son, John Crozier, the several lands hereinafter mentioned, that is to say, Moorefield, or otherwise Cavanteely, Cormick, Crockans, and Coagh, to take to his own proper use and benefit, from and immediately after he attains the full age of twenty-three years; and I also give and devise to my said son John, the lands of Gortra, Derrikerb, Drumsastry, and

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Cornavray, to take to his own proper use and behoof, from and immediately after the decease of my said wife, Katherine Crozier, all which said several lands and premises are situate in the county of Fermanagh aforesaid, and to take and receive the rents, issues, and profits thereof, for and during the term of his natural life, and after his decease, to the heirs male and female by him lawfully begotten; subject nevertheless to certain incumbrances and charges hereinafter particularly mentioned and expressed, that is to say, in case there shall not be a sufficient fund accumulated at the time of the death of my said wife, by the rents and interest received by my executors in manner hereinbefore desired to be received, and applied to pay to such of my younger children as shall be then living, a sum of 500*l.* sterling, each, my will is, that the said several lands so devised to my said son John, shall stand absolutely charged and incumbered with whatever sum there may be deficient or wanting in said fund to enable my executors to pay the said several sums of 500*l.* sterling to each of my younger children." And the testator then in the event of his son, John Crozier, not attaining the age of twenty-three years or leaving issue, devised the several premises to his other sons successively in like manner, and then to his daughters as tenants in common.

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At the time of his decease, his wife, Katherine Crozier, *and twelve children, eight of whom were named in his will, and four subsequently born, namely, Baptist, Edward, Everina, and Mervyn, were living.

With the exception of the dispositions contained in the foregoing will, which did not contain any reference to his power under the deed of 1797, the testator did not make any appointment of the lands of Gortra, nor did he make any provision for the children born subsequently to the date of the will. Upon the decease of the testator, Katherine Crozier, his widow, entered into possession of the lands of Gortra, and by indenture, bearing date the 1st of May, 1817, demised these lands to John Crozier the younger, for the term of her life, at the rent of 79*l.* 4*s.* per annum. Under this demise John Crozier the younger continued in possession to the present time.

The younger children resided with their mother, after the decease of their father, and were maintained by her out of the rents devised to her for life. It appeared that in the month of February, 1827, shortly after the youngest of the children who were born at the date of the will had attained the age of twenty-one years, an account

was settled between them and their mother, and that she then paid the sum of 598*l.* 17*s.* 11*d.*, which appeared by that account to be the sum due on foot of the legacy of 500*l.* given to each of them, and the shares of the legacies of two of the younger children, who had died in the interval. It appeared also, that shortly after the decease of the testator, John Crozier, the eldest son, in order to make some provision for the four younger children, who were born subsequently to the date of the will, and who were represented *as having been wholly unprovided for, executed his bond for 1,000*l.* to Alexander Hudson, in trust for the said children, to each of whom the sum of 250*l.* was to be paid respectively, on their attaining their full age, free from interest until then, except in case of the death of Katherine Crozier before said time; and that the amount due on that bond was paid before the institution of the present suit by Katherine Crozier, their mother, out of her own funds, to the three who survived, and the personal representative of Mervyn, who was dead.

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Under these circumstances, the present suit was instituted by some of the younger children of the testator against Katherine Crozier, John Crozier and others. The plaintiffs by their bill charged, that John Crozier, the testator, had not in any manner exercised the power of appointment contained in the deed of the 22nd of December, 1797, and prayed an account of the rents and profits of the lands of Gortra, received by Katherine and John Crozier the younger, and a partition thereof among the twelve children of the testator or the representatives of such as were deceased.

John Crozier and his mother answered jointly, and they insisted that the will of 1806 was a good execution of the power in the deed of 1797, that the demise of 1817, made to John Crozier by Katherine, was, in consideration of a rent, equivalent to the value of the lands; that the younger children were put to their election, between the shares of Gortra which they claimed, and the legacies given them by the will, and that as the latter had been paid, they should be refunded, if the claim to the former was enforced. They also submitted, that the plaintiffs were bound to refund *to the defendant, Katherine Crozier, the several sums of 250*l.* with interest, or allow credit for the same in taking the account. That said sums were paid only by reason, that those after-born children were left unprovided for, and that it would be unjust to permit the plaintiffs to receive the said monies on such an understanding, and

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then to enforce claims against these defendants, inconsistent with the acceptance of said monies.

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The *Attorney-General*, *Mr. Brooke*, and *Mr. Gayer*, for the plaintiffs, [cited *Brudenell v. Elwes* (1), *Robinson v. Hardcastle* (2), *Peters v. Morehead* (3), *Alexander v. Alexander* (4), and *Routledge v. Dorril* (5)]. The cases depend upon the intention of the testator inconsistent with the acceleration of the subsequent limitation, and not upon any technical grounds. In the present case the intention is plain, the eldest son was not to take anything in the estate, until the previous life estate, given to the wife, was exhausted, and as that estate was void and incapable of arising, the subsequent limitation so depending upon the previous one must also be held to fail. If the Court were to sustain this will as an execution of the power, it must reject every word of the will, except the name of the appointee.

Mr. Serjt. Warren, *Mr. Moore*, *Mr. John Brooke*, *Mr. Armstrong*, and *Mr. Peebles* for the defendant. * * *

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Mr. Gayer, in reply.

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In this case, the settlement of Gortra was to the father, John Crozier, for life, and after his decease, to the use of, and to, and amongst such one or more of the child or children of him by his wife, as he should appoint, and to the heirs and assigns of such child and children for ever ; and for default of such appointment, to the children as tenants in common in fee, and for default of such issue, which means in default of such children, to John in fee. The devise of Gortra, which was made without reference to the power, but was an execution of it, as the estate was devised by name, was treated at the Bar as a devise to the wife for life, with remainder to the eldest son in fee. It was contended that the life estate being void, the remainder after it was also void, and it was admitted, that the principle of the decisions was against the validity of the devise in remainder to the son.

I propose to consider how the law stands in the case of a devise not under a power, and how far that law applies to this case.

(1) 6 R. R. 310 (1 East, 442 ; 7 Ves. 382).

(2) 1 R. R. 467 (2 T. R. 241, 781).

(3) Fitzg. 156.

(4) 2 Ves. Sen. 640.

(5) 2 R. R. 250 (2 Ves. Jr. 357, 363).

Secondly, the extent of the decisions upon appointments, and their applicability to devises not under powers. And lastly, whether the devise in remainder to the son is struck at by the authorities, or the principles, upon which they were decided.

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First, it is laid down, as early as 9 Hen. VI. (1), by Godred, that a devise is more powerful than a grant by deed; for if one lease lands by deed to a man who is professed (who is not *capax*) for life, the remainder over in fee, or land is leased for life to a man, where there is none *such in *rerum naturâ* for life, the remainder over in fee, that remainder and all is void for *debile fundamentum*, &c.; but in both the cases, upon a devise the remainder is good; and this is adopted in Rolle's Abridgement (2), Plowden (3), and many other authorities. Perkins (4) says, that although the monk survive the testator, the remainder shall take effect presently. In *Trinity College* case (5), Chief Justice FLEMING, and in *Thornby v. Fleetwood* (6), Lord Chief Justice TREVOR lay down the rule generally, that a devise to one, who is a monk, with remainder over, this is a good remainder. I may further refer to the doctrine of Chief Justice TREBY, in *Scatterwood v. Edge* (7). In *Avelyn v. Ward* (8), Lord HARDWICKE, not speaking of gifts void as perpetuities, observed, "that he knew no case of a remainder, or conditional limitation over of a real estate, whether by way of particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation, but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place." In like manner a devise to one in fee after the death of the third person, to whom no previous estate is limited, is valid, and the estate, during the life of that third person, either vests in him by implication, or descends to the heir-at-law according to the intention of the testator.

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It appears, therefore, that although the particular estate is given to a person incapable of taking, or is not given at all, the devise in remainder or at the future time is valid. *Now this depends wholly upon intention, which the Courts execute even at the expense of the general rule of law, and this intention is thus executed, because the disposition is by will. Whether a man have the fee vested in him, or only a general power of appointment, his

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(1) Year Book, 9 Hen. VI., 24.

(2) Tit. Remainder (C. 4, 5).

(3) Page 414.

(4) Sec. 567.

(5) 2 Gouldsb. 246, 247.

(6) *Strange*, 318.

(7) 1 Salk. 229.

(8) 1 Ves. Sen. 420.

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intention expressed in his will is equally to be executed. It matters not whether he appoints or devises, provided that he do not exceed his power. For example, suppose a man, having a general power of appointment, to appoint by will to a monk for life (as under the old law), remainder to A. in fee. No doubt the estate for life would be void, and the gift to A. be good. If the power be confined to particular objects, it cannot be exceeded, but within its limits, the intention of the testator, the donee of the power, must be observed. In this case, therefore, let us suppose a similar devise to a monk for life, remainder to the eldest son of the testator in fee, the life interest would be void by the general law, and also as an appointment to a stranger: but there is no reason why a different rule should be applied to the gift of the remainder, from that which would apply to a devise not under a power. I assume that the power authorized a gift of a remainder in fee, and then the testator's disposition stands on the same footing with a similar one by a deviser seised in fee. There ought to be no trifling distinctions between power and property upon merely technical grounds. The object of powers sanctioned by law is to enable the donee, to the extent of the authority, to do what a commensurate estate would have enabled him to accomplish. In the cases of powers indeed the intention would be effectuated beyond the naked cases at law, for there the particular estate is defeated, and the remainder is accelerated, whilst in the former cases, although the estate for life is void, yet the remainder continues such, and the estate, *during the life of the intended taker, goes as in default of appointment.

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But it is supposed that the point is concluded by the authorities; I shall now, therefore, proceed to consider the cases which have arisen under powers. The doctrine laid down in *Alexander v. Alexander* (1) cannot be disputed: the power was to appoint to children; the appointment was to a daughter for life, and, after her death, to her children living at her death; in default of such children, to the daughter herself, if she survived her husband; but if she died in his life-time, to two other children. The gift to the grandchildren was held to be void. Sir THOMAS CLARKE said, as to the gifts over, suppose the daughter leaves children at the time of her death, it was impossible any of these limitations over should take effect; and the children, though they could not take themselves, would yet prevent the limitation over. I may observe

(1) 2 Ves. Sen. 640.

that the testator's intention would have forbidden a contrary construction, for, in the case assumed, the testator did not intend the limitation over to operate. In *Cavendish v. Cavendish* (1), where, under a power to appoint to children, the appointment by will was to a son Richard for life, with remainder to his sons in tail, with remainder to another son George for life, Lord MANSFIELD, in delivering the judgment of the Court, said, that it was objected that the appointment, being void in part, should be void *in toto*; but as to that, they were of opinion, that if void as to the children, it was good to George for life. Now this opinion is not supported by later authorities; but it shows powerfully that in the opinion of that Court there was nothing in the *nature of an appointment which would prevent gifts over to objects from taking effect, where gifts to strangers could be displaced; or, in other words, that appointments under powers were in this respect subject to the general law. The same point arose in *Robinson v. Hardcastle* (2): Lord THURLOW sent it to law, but he observed that the question was, whether such an illegal estate being interposed, it shall not be considered as a nullity, and the next estate be brought forward, and attached to the estate for life. The cases seemed to support this doctrine, but not so clearly, as for it not to deserve further consideration. This, he said, was a will; the object of it was to execute a power; it must have, therefore, the favourable construction of a will, and you must consider the testator as intending, if the first use was bad, that the subsequent limitation should take place, therefore this seemed an extraordinary intent to attribute to him. The case at law is reported in the Term Reports (3), and I may observe that the marginal note is altogether inaccurate. It was twice argued: upon the first argument Mr. Justice BULLER observed, that if a subsequent limitation depended upon a prior estate, which was void, the subsequent one must fall together with it. If, indeed, the subsequent limitation was not dependent upon the other, it might then take place, notwithstanding the first was bad. This is explained by the argument at the Bar, for in referring to devises to a monk with a remainder over, it was said that there the remainders were vested in persons then in being, and did not depend upon the preceding estate. After the second argument, the learned Judge held that *Alexander v. Alexander* was an authority against accelerating the remainder to the objects of the

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(1) 4 T. R. 741, *n*.

(2) 2 Br. C. C. 22, 344.

(3) 1 R. R. 467 (2 T. R. 241).

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*power, and he observed that it would be contrary to the intention. The certificate, which was altered in consequence of the doubt, whether the son did not take an estate tail (1), was confirmed by the LORD CHANCELLOR. In the case of *Routledge v. Dorril* (2), Lord ALVANLEY followed *Alexander v. Alexander* and *Robinson v. Hardcastle*, and thought it would be monstrous to contend, that though "the appointment to the child was in failure of the existence of persons incapable of taking, yet, notwithstanding they exist, he should take as if it was not appointed to them and they had failed." The same point was decided the same way in *Brudenell v. Elwes* (3), and Lord KENYON rested the case upon the intention, and the bill in equity was dismissed. Lord ALVANLEY decided in *Crompe v. Barrow* (4) that where the gift over to the object of the power was concurrent with the invalid gift, that is, where the contingency was with a double aspect, and the event happened, which gave effect only to the valid gift, it would operate.

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This review of the authorities has satisfied me that the question turns upon the intention, and not upon any thing peculiar to powers, beyond the circumstance that the invalidity of the intermediate estates was occasioned by an excess in the execution of the power. When I argued the case of *Beard v. Westcott* (5), which Lord ELDON affirmed, I relied upon the rule, established by the cases upon powers, to which I have referred. That case did not depend upon a power. The testator devised, first, valid uses; secondly, *invalid ones, as tending to a perpetuity; and, thirdly, uses depending upon the contingent determination, within the period allowed by law, of the invalid uses. The Court of Common Pleas (6) held that the third gifts would be good if the event happened. This always appeared to me to be wrong; for the consequence was, that there might be a person *in esse* entitled to take according to the words of the first limitation in the will, but incapable in law, and a remainder man *in esse* capable of taking by law, but incapable of taking under the will, because the contingency had not happened, which was to determine the preceding estate (7). There was another important point in the case, but although the Court of King's Bench did not in their certificate express the ground upon which they differed from the Court of

(1) 1 R. R. 467 (2 T. R. 241, 781).

(2) 2 R. R. 250 (2 Ves. Jr. 357).

(3) 6 R. R. 310 (1 East, 442).

(4) 4 R. R. 318 (4 Ves. 681).

(5) 24 R. R. 553 (5 B. & Ald. 801).

(6) 5 Taunt. 393. See 24 R. R. 555, *u.*

(7) 24 R. R. 560 (5 B. & Ald. 809).

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Common Pleas, I always considered it to be that which I have just stated, and which we have now before the Court. The same rule of law was considered applicable whether the intermediate remainders were invalid by an excess of the power, or by reason of a general rule of law. Even in a case upon a power to appoint to children, Sir THOMAS CLARKE, in *Alexander v. Alexander*, thought that under an appointment indefinitely to a son by name, who never appeared to have existed, or was never capable of taking, and others, who were capable of taking, the latter would have the whole, must, he said, take such as the others were incapable of taking; and he said the case fell within the reason of a case, to which he referred, and which was a case of general bequest not operating under a power. I do not say that I could follow this precedent, but I quote it to show that these cases have been decided upon reasons applicable to all devises, and *not confined to appointments by will under powers. I feel myself, therefore, altogether relieved in this case, from the pressure of the authorities, which have decided against the validity of the ultimate gifts over: they do not apply to this case, for here although the life interest is void, yet it would still further defeat the testator's intention, if the remainder in fee to his eldest son were not supported, and the cases, to which I first referred, enable me to give to that extent effect to his intention. So far, therefore, as depends upon the points already considered, I hold that although the estate for life was void, the gift in remainder to the eldest son in fee was valid.

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But before I make this declaration, I must be satisfied that this power, which is an exclusive one, authorized the appointment of a remainder in fee to the son. I am of opinion that it cannot be maintained, that the settlement itself limited the quantity of estate which the appointees were to take, and left it to the donee of the power only to designate the objects to take; and I think that under such a power as this, which extends to the fee, a lesser interest may be appointed: *Bovey v. Smith* (1), *Phelp v. Hay* (2), both prove this proposition to a great extent. I should think it mischievous to determine otherwise. The power must not be exceeded nor its directions evaded; but where there is no prohibition, every thing which is legal and within the limits of the authority should be supported, and therefore I think that a power to appoint a fee, but with no prohibition against giving a less estate, ought to be held to authorize any legal limitations within the scope of the

(1) 1 Vern. 84.

(2) Treatise of Powers.

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power *which may be served out of the fee. The appointment, however, here is in fee, but it is in remainder. In *Cavendish v. Cavendish*, Lord MANSFIELD, in delivering the opinion of the Court, answered this objection. He said *Alexander v. Alexander* was cited, in which case the MASTER OF THE ROLLS was of opinion that a reversion could not be given,—but why? Because it was meant as a portion; but this was not so.

There is another point which has struck me upon this will: the devise is to the wife for life, but it is to educate and maintain his children, and to provide portions of 500*l.* a-piece for the seven children then living. I think that these provisions were within the scope of the power, although certainly that is a very liberal construction. These sums were, however, charged on the remainder in fee of the son absolutely, so that they were charges on the inheritance, and the disposition of so much of the estate, and in that view, under even a strict construction of the power, might be deemed a good equitable execution; for a power to give the estate authorizes, in equity, a sale and a gift of the produce of the estate. In this Court, the circumstance of these purposes being effected through a devise to a stranger is immaterial, for that is a defective execution, which this Court will aid. The provision for maintenance should be held to cease, when the children attained twenty-one, or as to any of the seven children who became entitled to portions, or married before twenty-one, upon that event. The wife, perhaps, was not intended to take any beneficial interest, but I cannot act upon that view. As however, although a stranger, the excess in the execution of the power in the benefit intended for her is clearly distinguishable from the benefits provided for the children, I *shall declare the excess only to be void upon the authority of *Alexander v. Alexander*. The other two estates did not become available for the portions, &c.; but the surplus personal estate would be a fund applicable to the 500*l.* portions. I shall declare the gift to the wife for life void, but that the trusts and purposes are valid so far as they are in favour of the children, and void only as to the excess in favour of the wife, and that the gift to the son in fee in remainder is valid. The Master must ascertain when the portions and the maintenance and education purposes were raised, or could have been raised, by a due application of the rents and profits, and of the surplus personal estate; and let it be declared, that from the period when the portions were or could have been raised, the rents and profits during the wife's life belonged to all the children as

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tenants in common under the settlement, and the plaintiffs' rights will be declared accordingly. Reserve the costs until after the Master has made his report. If, however, the plaintiffs do not think it worth while to take the account, I will at once dismiss the bill without costs.

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On this day the *Attorney-General*, on the part of the plaintiffs, declined to take the account; and the bill was accordingly dismissed without costs.

Jan. 27.

CROZIER v. CROZIER, No. 2.

(3 Dr. & War. 373—388; S. C. 5 Ir. Eq. R. 415.)

1843.
Jan. 18, 26.

A testator devised lands, of which he was seised *pur auter vie*, to his nephew, J. C., for life, and then proceeded thus: "And from and after his decease, I give and devise the same unto the issue male and female of the said J. C. now begotten, or to be begotten, on the body of his present wife, to be divided between and amongst them in such manner, shares and proportions, as the said J. C. shall, by his last will, limit and appoint; subject, nevertheless, to the provisions hereinafter particularly mentioned, viz. that the said J. C., his heirs, executors, administrators, and assigns, and the persons, who shall become entitled thereto, under this my will, shall and will pay the head landlord's rent of the said lands, and shall and will, yearly and every year, during the continuance of the lease, pay, or cause to be paid, to S., his heirs or assigns, one yearly annuity or sum of 40*l.*, &c." J. C. did not duly exercise his power of appointment:

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Held, that J. C. took an estate for life only; and that his issue took absolute interests as tenants in common as purchasers; and that the words "issue male and female" meant sons and daughters, or the first line of issue.

JOHN ROSBOROUGH made his will, dated the 8th of May, 1803, to the effect following:

After certain devises and bequests not material in the present case, it proceeded thus: "I give and devise unto my nephew, John Crozier, senior, of Gortra, in the county of Fermanagh, the lands of Drumsastry, Derrikerb, and Cornavray, situate, &c., to hold to him during his natural life; and from and after his decease I give and devise the same unto the issue male and female of the said John Crozier, now begotten, or to be begotten on the body of his present wife, Katherine Crozier, otherwise Rosborough, to be divided between and amongst them in such manner, shares and proportions, as the said John Crozier shall, by his last will and testament, limit and appoint, subject, nevertheless, to the provisoes hereinafter particularly mentioned, that is to say, that the said John Crozier, his heirs, executors, administrators, and assigns, and

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the persons who shall become entitled thereto under this my will, shall and will, well and truly, pay the head landlord's rent of the said lands, and shall and will, yearly and every year, during the continuance of the lease, pay or cause to be paid to my grand-nephew, John Scott, his heirs or assigns, one yearly annuity or sum of 40*l.*, &c., to be issuing and payable to him out of all and every the said lands, &c.; I give and *devise to my grand-nephew, Alexander Scott, the lands of Derrydown, &c., to hold to him and his heirs for ever."

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These clauses were followed by several pecuniary bequests, by a devise of certain other freehold properties of the testator, and by a residuary devise expressed in these words: "As to all the rest, residue, and remainder of my estate and property, whether real, freehold, or personal, of what nature or kind soever, that I shall die seised or possessed of, or entitled unto, and not hereby particularly devised, bequeathed, or disposed of, I give, devise, and bequeath the same to my brother, Thomas Rosborough, and his wife, Frances Rosborough, for and during their natural lives;" with limitations over.

At the time of making his will John Rosborough was seised of the lands of Drumsastry, Derrikerb, and Cornavray, under a lease thereof for three lives, from the Earl of Lanesborough, and at a rent of 240*l.* per annum.

John Crozier, the nephew of the testator, by his will of the 22nd of January, 1806 (1), bequeathed unto his younger children, Thomas, Frances, Robert, Mary, Margaret, Rosborough, and William, the sum of 500*l.* each, to be paid to them respectively upon their attaining their respective ages of twenty-one years, or marrying with the consent of his executors, whichever should first happen; with a direction that in case any of the said children should die before that period, the share of such child should go to and amongst the survivors. The testator further directed, that in order to accumulate a sum for the payment of the said *legacies, his executors should immediately after his decease collect and receive half-yearly the rents and profits arising out of the lands of Drumsastry, Derrikerb, and Cornavray, and upon receiving same, invest it at interest for the purpose aforesaid. The testator, John Crozier, then devised the said lands of Gortra, Derrikerb, Drumsastry, and Cornavray, to his eldest son, John Crozier, to take to his own proper use and behoof from and immediately after the decease of his wife,

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(1) See *ante*, p. 67.

Katherine Crozier, for and during his natural life; and after his decease, to the heirs male and female by him lawfully begotten, subject to the payment of so much of the said legacies of 500*l.* to each of his younger children, as the fund directed to be raised in the previous part of his will for the payment thereof should be insufficient to satisfy. In failure of his said son attaining the age of twenty-three years, or leaving lawful issue, the testator devised the said lands to his second son, Thomas, with remainders over.

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The testator, John Crozier, died in January, 1814. Subsequently to the date of John Crozier's will there were four other children born to him, Baptist, Edward, Everina, and Mervyn. John Crozier, however, died without making any provision for these children, or in any respect altering his will. It was stated that shortly after the decease of John Crozier, a case was laid before counsel, on behalf of his widow and eldest son, relative to the rights of the younger children to a share of the lands devised by John Rosborough. It did not appear that the opinion given upon this case was ever communicated to the younger children; but on the 20th of September, 1814, John Crozier, the eldest son, executed his bond for 1,000*l.* for the benefit of the four children who were born subsequently to the date of their father's will, at the instance and under the belief, as the defendant in his answer stated, that these children were left wholly unprovided for under their father's will; and it was represented that the amount of this bond had been paid.

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The bill in this cause was filed by Edward Crozier, one of the subsequently born children, claiming to be entitled to a share of the lands devised by the will of John Rosborough. The plaintiff submitted that his father took but a life estate in the lands in question under the will of his uncle, with a power of appointment among his children; and that not having properly exercised this power, the lands passed as in default of appointment. The bill accordingly sought for a partition among the younger children, and an account of the rents and profits since the time the plaintiff became entitled to receive the same.

The defendant, John Crozier, by his answer, insisted that, upon the true construction of the will of John Rosborough, his father took an estate *quasi* in tail, and that as he had not executed any deed, or done any act to bar the entail, the lands came to him upon the decease of his father as the heir *quasi* in tail.

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The *Attorney-General*, *Mr. Brooke*, and *Mr. Gayer*, for the plaintiff, [cited *Hockley v. Maubey* (1), *Lees v. Mosley* (2), *Ryan v. Cowley* (3), *Jesson v. Wright* (4), *Allen v. Allen* (5), and other cases].

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Mr. Bessonnet and *Mr. Butt*, for a defendant, in the *same interest with the plaintiff. * * *

Mr. Serjt. Warren, *Mr. Moore*, *Mr. John Brooke*, *Mr. Armstrong*, and *Mr. Peebles*, for the defendant, *John Crozier*, [cited *Jesson v. Wright* (4), *Tate v. Clark* (6), *Doe v. Featherstone* (7), and other cases].

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Mr. Gayer, in reply. * * *

THE LORD CHANCELLOR :

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I do not feel any great difficulty in this case. It is perfectly settled that the expression "issue male and female" will, in construction, bend more easily to the intention *of the testator than words such as "heirs of the body," which are more inflexible, and denote a line of successive takers. Where there is a gift to one for life, with remainder to the heirs of his body, in which case, by the operation of the rule in *Shelley's* case, the ancestor is held to take an estate tail, the expression "heirs of the body" retains its technical, and, I may say, its natural meaning; but this limitation is of a different character: it is in these words: "I give unto my nephew, *John Crozier*, the lands of *Drumsastry*, *Derrikerb*, and *Cornavray*, to hold to him during his natural life; and from and after his decease I give the same unto the issue, male and female, of the said *John Crozier*, now begotten, or to be begotten, on the body of his present wife, *Katherine Crozier*, otherwise *Rosborough*, to be divided between and amongst them in such manner, shares and proportions, as the said *John Crozier* shall, by his last will and testament, limit and appoint, subject, nevertheless, to the provisos hereinafter particularly mentioned." Now there is great difficulty in the case, unless it can be shown that "issue male and female" mean children: but, to adopt that construction, it must be made out that the issue would take the whole interest, because it is clear that the testator intended to dispose of the whole interest;

(1) 1 R. R. 93 (1 Ves. Jr. 143).

(2) 41 R. R. 348 (1 Y. & C. Ex. Eq. 589, 609).

(3) 46 R. R. 176 (Lloyd & G. t. Sugden, 7).

(4) 21 R. R. 1 (2 Bligh, 1).

(5) 59 R. R. 696 (2 Dr. & War. 307).

(6) 49 R. R. 296 (1 Beav. 100).

(7) 35 R. R. 491 (1 B. & Ad. 944).

and if they are not capable of taking it under the limitation to them alone, that is, to them as purchasers, then you must try, if they cannot take it under the joint effect of the two limitations, that is, through their father, in which case he must be held to take an estate *quasi* in tail. The decision of the House of Lords in *Jesson v. Wright* (1) turned upon this principle. The opinion of the Court of King's Bench (2) defeated *every intention of the testator in that case; for clearly his meaning was, that the estate should not go over, according to the final limitation, until there was a total failure of the issue of the first taker. The Lords did not establish any new doctrine, they merely restored and supported the former authorities, giving to the words their technical and natural import. In that case there was not any way in which the Court could have effectuated the intention but by giving the father an estate tail. Here an estate for life is expressly given to John Crozier; but the words themselves are not sufficient to pass all the interest to the issue, unless the subsequent words denote such an intention.

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I have on a former occasion (3) expressed my approbation of the decision in the case of *Doe v. Robinson*. I think that case was rightly decided, and that there is nothing so peculiar in the nature of property held *pur auter vie*, as to justify the Court in dispensing with the use of the proper technical words, which are required to carry the fee in the case of lands of inheritance; therefore, in order to construe this will, so as to vest all the interest in the children by purchase, I must find something which indicates an intention to give it to them. Now in this will, although there is no express gift over, there is a general residuary gift, which would include everything not previously disposed of, whether within the immediate intention of the testator or not. But still that has not the same force, which it would have had, if the testator had introduced it by the common words "and in default of such issue," because that would have aided in the explanation of the previous words. Where there is a gift to A. for life, and if A. die without *issue, then over, although there is no gift to the issue, yet, by implication, the law intends that the issue are objects of the testator's bounty, and by giving an estate tail to A., effect is given to all the words of the will.

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In this case there is a repetition of the formal words of the devise, "and from and after his decease I give and devise the

(1) 21 R. R. 1 (2 Bligh, 1).

(2) 5 M. & S. 95.

(3) *Allen v. Allen*, 59 R. R. at p. 707
(2 Dr. & War. 327).

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same"—this looks like a new gift—"unto the issue male and female of the said John Crozier, now begotten or to be begotten on the body of his present wife, to be divided between and amongst them in such shares and proportions as the said John Crozier shall, by his last will and testament, limit and appoint." It was not argued at the Bar, what interest might have been appointed to the issue under this power; I am, however, clearly of opinion that the whole interest might have been appointed, and, if so, the gift by the will to the issue in default of appointment, by implication, cannot be considered to be less than what might have been appointed to them by the exercise of the power. Here again there are words of division, "between and amongst them;" and although these words may be, and often are, rejected in a will, yet it is only in favour of some paramount and governing intention of the testator, which could never have effect unless those words were to give way. These words, therefore, are of some importance; but the following clause appears to me to put the matter beyond all doubt: the words are, "subject, nevertheless, to the provisoes hereinafter particularly mentioned; that is to say, that the said John Crozier, his heirs, executors, administrators, and assigns, and the persons, who shall become entitled thereto under this my will, shall and will, well and truly, pay the head landlord's rent of said lands, and shall and will, yearly and every year *during the continuance of the lease, pay, or cause to be paid, to my grand-nephew, John Scott, his heirs or assigns, one yearly annuity or sum of 40l." What then is directed to be done under this clause? An annuity is to be paid during the continuance of the lease; and who are to pay it?—why, the persons who, from time to time, should become entitled to the lease. The estate and the annuity were to be commensurate; and as the annuity was to last during the continuance of the lease, the entire interest of the testator in the lease must be considered to have passed under the previous clause. The persons to pay are John Crozier, his heirs, executors, administrators, and assigns, and the persons who, from time to time, shall become entitled thereto under this my will. This is incorrect. John Crozier took for his life; the subsequent words, which include his heirs, executors, and administrators, were thrown in unskillfully. A life estate is expressly given to John Crozier, and afterwards to a class, which must include his heirs, but the gift to them is in the character of heirs. Must I not suppose that the testator, when he says "John Crozier, his heirs, executors, administrators," &c.,

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was alluding in this clause to those persons, to whom he had given the property in the preceding clause?—I mean the persons comprehended in the description “issue male and female.”

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The will appears to me to be clear and free from any ambiguity; but as this case is a very important one, I shall look into it again before I dispose of it finally, although it depends upon authorities, with which I have been familiar for the greater part of my life: at present, my strong impression is, that the father took for life, and the children absolutely.

THE LORD CHANCELLOR:

Jan. 26.

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I have attentively considered this case, and I have looked into the principal authorities. Few Judges are less disposed than I am to cut down the general import of clear words of limitation. The danger of doing so is shown in the case of *Jesson v. Wright*, the reasons in which case, as they have been referred to, I may observe, were written immediately after the judgment of the King's Bench was pronounced; and the rules there propounded are, I believe, warranted in law. In this case the devise is to the issue, and that word may, undoubtedly, be construed a word of limitation or of purchase, according to the sense in which it is used by the testator, but always adhering to settled rules. Now here the devise is not simply to a man and his issue, but an express estate for life is given to John himself, and after his decease there is a separate gift to the issue male and female of John now begotten, or to be begotten, on the body of his present wife, to be divided between and amongst them in such manner, shares and proportions, as John should by will appoint. The terms of this gift show, that the testator meant John to take expressly for life, and that he was providing for the children then born, of whom there were many, and although he provided also for issue to be begotten, yet it is not an unfair inference, that he meant the like class, namely, children, the first line of issue. The terms of the devise also show, that he meant the issue to take amongst themselves as tenants in common and not in succession, according to seniority as issue in tail, although the extent of every share was left in the power of the father. But life estate, separate gift, reference to issue born, tenancy in common, power to vary the shares, would all give way, and John would be held to take a *quasi* estate tail, if the will showed a clear intention to include all possible *issue, and that they could only take under the father. But this will shows no such intention;

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every thing which I have stated leads to the opposite conclusion, and there is nothing to defeat that view; for not only is there not any gift over in default of issue, but there is a clear intention to vest the whole estate in the issue, which I explained when the cause was heard. I am of opinion, therefore, that the issue take the whole estate as tenants in common as purchasers, and that issue, male or female, means sons and daughters, or the first line of issue.

I am not, having regard to the facts of this case, embarrassed with the question, whether issue would have included grandchildren living at John's death. My own opinion is, that in this case it meant children. It would be mere pedantry to go over the cases. *Hockley v. Mawbey* (1), and *Lees v. Mosley* (2), in which case all the authorities are collected, are clear authorities for the declaration which I am about to make, but my decision proceeds upon the general warrant of authority. John and his mother ought not to have kept the afterborn children in ignorance of their rights; but on the other hand, the 1,000*l.* was clearly secured by John, and paid, it is said, by the mother as portions; that is proved by the indorsement on the bond and warrant of attorney, and it was not until the plaintiff had received his portion, that he sought to impeach the will of his father. I shall, therefore, confine the account to the filing of the bill. The costs of all parties are to come out of the estate, I must declare that all the children took as tenants in common the whole interest, and that the plaintiff is entitled to his proportion accordingly. The plaintiff may have a partition, if he desires it.

SCOTT v. NIXON (3).

(3 Dr. & War. 388—408; S. C. 2 Con. & L. 185; 6 Ir. Eq. R. 8.)

1843.
Feb. 6, 8.
—
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The Court will compel a purchaser to take a title depending upon parol evidence of adverse possession under the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27).

A testator, by his last will and testament, after appointing certain lands to his eldest son, George, gave all the residue of his real estate among his six younger sons, subject to the payment of his debts and some charges. Shortly afterwards he obtained a conveyance of certain freehold property, which was the subject of the controversy in the present suit, and died without having altered in any respect or republished his will, leaving his eldest son of full age.

Upon the death of the testator in 1791, the six younger sons entered into

- (1) 1 R. R. 93 (1 Ves. Jr. 143). (3) Discussed, *Dalton v. Fitzgerald*
(2) 41 R. R. 348 (1 Y. & C. Ex. Eq. [1897] 2 Ch. 86, 66 L. J. Ch. 604,
589). C.A.

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the possession, *inter alia*, of the after-acquired property, and so continued until the present time. George, the eldest son, died in 1819, leaving an infant heir. It did not appear that any claim was ever made on the part of George during his life, or after his death by his heir-at-law, and the younger sons continued during the entire of such period in the undisturbed enjoyment of the property. In 1839 the premises were sold under a decree of the Court, pronounced in a suit instituted by a judgment creditor of the testator, in which suit the infant heir was a party defendant. Subsequently to this sale the heir died, and the suit was not revived against the next heir. The abstract of title stated all the above matters, and was verified by two affidavits, deposing as to the fact of the possession and receipt of rent by the younger sons: Held, upon objections to the title on the part of the purchaser, that by the operation of the Real Property Limitation Act, 1833, such a title had been created as the purchaser was bound to take.

By the effect of the statute, after the proper period of limitation has passed, the legal fee-simple is in the party who has been in possession during that period, and he is competent to convey it to another.

There is no saving of minority given in the fifteenth section of the statute, and therefore the period of five years given by the section cannot be extended by reason of the infancy of the claimant.

ALEXANDER NIXON, by his will, bearing date the 5th of March, 1776, after referring to certain lands which had been the subject of settlement, and appointing same to his eldest son, George Nixon, devised the residue of his real estates, after payment of his debts, and some pecuniary legacies, to his executors and their heirs, for the use of his six younger sons, Adam, Andrew, Montgomery, Thomas, Robert, and James Nixon, share and share alike, as tenants in common in fee.

Shortly after the date of this will, and in the same year, certain lands and premises called the lands of Mullyardlogher, *and a tenement called Rea's tenement, adjoining the town of Enniskillen, and which were held for lives renewable for ever, were purchased by Alexander Nixon, and on the 16th of November, 1776, the deed of conveyance was executed, whereby said premises were assigned to the said Alexander Nixon and his heirs for ever.

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Alexander Nixon died in the month of March, 1791, without having altered in any respect, or republished, his will, leaving his eldest son, the said George Nixon, and his six younger sons him surviving.

Upon the decease of their father, his eldest son, who was of full age, entered into the possession of the settled estates, and the younger sons into the receipt of the rents of the rest of the estates of the testator, including the lands of Mullyardlogher and Rea's tenement.

In 1819 George Nixon died, leaving his daughters, Mary and Anna, his only children, and co-heiresses-at-law, of whom Anna

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was the survivor, her sister Mary having died a minor, intestate, and without issue.

In 1820, the original bill in this cause was filed by Beresford Burston, a judgment creditor of Alexander Nixon, for the purpose of raising the amount secured by his judgment. The daughters of George Nixon, who were not parties to the original bill, were made parties by an amendment in 1822; and in 1826 a decretal order was pronounced, directing the usual accounts.

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In 1835 a bill of revivor and supplement was filed by Scott, the assignee of the judgment of the plaintiff in the original *cause; and to this bill Anna, the surviving daughter of George Nixon, was made a party defendant. She was a minor at the time, and by her answer she claimed to be entitled to one undivided sixth of the property devised by the testator, Alexander Nixon, to his six younger sons, as being the heiress-at-law of one of them, Robert Nixon, who had died intestate and without issue; and she submitted her rights generally to the judgment of the Court.

On the 28th of April, 1838, a decree was pronounced for the sale of the property of which Alexander Nixon, the testator, was seised and possessed; and on the 24th of April, 1839, the denomination in question, Rea's tenement, was sold.

The abstract of title, which was furnished on the part of the plaintiff, after setting forth the above facts, stated that Anna Nixon, having attained her full age, and being about to be married, by deed bearing date the 15th of June, 1840, immediately previously to such marriage, but with the concurrence of her intended husband, John N. Blake, assigned her interest in and to her undivided one-sixth of the said premises to the Rev. Thomas Ovenden, in order that he might join in making out title, and in a proper deed of conveyance of the said premises and the other lands directed by the decree to be sold.

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The abstract further stated, that by the settlement executed on the occasion of the marriage of the said Anna Nixon with her husband John N. Blake, all her estates therein mentioned were conveyed to trustees upon certain trusts, reserving, however, to herself absolute control over same: and that on the 12th of September, 1841, she died, having by her will directed, that all her estate should remain *vested in the trustees of her marriage settlement, upon the trusts therein specified.

The abstract further stated, that George Nixon, at the period of his father's decease, and for many years afterwards, was a practising

barrister, and well acquainted with his own rights, and the manner in which the property was circumstanced: that his younger brothers had entered into the possession of the premises in question with his concurrence, and that he had never questioned the propriety of their thus possessing themselves of said premises, and dealing with them as their own: that these premises formed a part of the property settled upon the occasion of the marriages of some of the brothers: that George Nixon was conversant with these facts, and was himself a trustee in the settlement of one of them, Adam Nixon.

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The purchaser objected to the title to the premises in question, first, on the ground that having been purchased by the testator subsequently to the date of the will, and there having been no republication of said will, they did not pass to the younger children by force of said will; and that no proof was given to sustain the statement, that the younger children had continued ever since the death of their father to receive the rent of the premises in question. Secondly, he insisted that since the death of Anna Nixon, there was not before the Court in the cause any person, in whom the legal estate in the premises sold was vested.

The plaintiff having obtained a reference to the Master in the cause, as to the title to the premises in question, two affidavits were filed in support of the abstract, one by *Terence Magavran, who had acted as bailiff to the property; and the other by Mr. Ralph Scott, the solicitor for the plaintiff in the cause.

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Magavran, in his affidavit, stated that he was upwards of seventy years of age: that he was acquainted with Alexander Nixon, and that upon his death in 1791, his younger sons entered into the possession of the lands of Mullyardlogher and Rea's tenement; and continued to receive the rent of the same, and to exercise dominion over them, from the day of the decease of their father up to the present time, free from the interference, claim, or demand of any person whatsoever: that he was well acquainted with all the sons of Alexander Nixon, having for upwards of fifty years acted as their bailiff, and assisted in managing their estates and collecting their rents, and was in the habit of constant intercourse with them: that George Nixon was a practising barrister, and was well acquainted with his own rights and the circumstances of the property: that he lived principally with and amongst his said younger brothers: that deponent never heard or knew of the said George Nixon, or any person on his part, from the death of the said Alexander Nixon

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up to the decease of the said George Nixon, ever having claimed any title to the premises in question; and that from the peculiar position in which he was placed, he did not believe it possible that any claim could have been made respecting said lands without his knowledge. The deponent further stated, that since the death of George Nixon he had continued to act as bailiff to the estates of the daughters of George, until the surviving daughter Anna attained full age, which took place in the year 1838; and that he had never heard that, *during that interval, any claim was made on behalf of said Anna, save to one undivided sixth part, to which she became entitled as heiress-at-law of her uncle, Robert Nixon.

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The affidavit of the solicitor, Mr. Scott, stated that he had been informed and believed that upon the death of the testator, Alexander Nixon, his younger sons took possession of the premises in question, and that they and their devisees or representatives had ever since continued to hold and enjoy the undisturbed possession thereof: that upon the occasion of the respective marriages of Adam Nixon and Andrew Nixon in 1793, and Montgomery Nixon in 1794, each of said younger sons assigned to trustees their one-sixth undivided share of various lands and premises, and, amongst others, of the property in question: that he had been for upwards of thirty years intimately acquainted with the Nixon family, and for a great portion of said time had been the law agent of the majority of the family: that he was acquainted with George Nixon, who was a practising barrister, and that he never knew or heard that George Nixon in any manner, or any person for him or on his behalf, during his life or since his decease, claimed any interest in the premises in question: that George Nixon was well aware that the rents of said property were received by his younger brothers for their own use: that in the year 1820 deponent was appointed agent to collect the rents of part of the property, to which the younger children claimed to be entitled, including the premises in question: that previously thereto the rents of these premises were received by some one of the younger sons, and by them applied for their own use, with the rents of several other lands, in payment of head-rents, renewal fines, interest on judgment debts, and other charges on the property, and *that no part thereof was given to the said George Nixon: that he acted under a power of attorney from the younger sons, and that he was directed by them to apply the rents received out of the premises in question and the other lands, over

which he was appointed agent, in payment of renewal fines and head-rents, payable out of the other properties of said younger sons, and in discharge of interest upon judgment debts, which were charges upon the property of the younger sons, but did not affect the property of George Nixon. The deponent further stated that he had in his possession various account-books and memorandums, in the handwriting of one or other of the younger sons; from which it appeared that they exercised undisputed control over the premises in question, immediately after the decease of their father, and continued to hold it for their own use free from the interference or claim of their eldest brother; and that from the intercourse which subsisted between him and the said George Nixon in his life-time, and also with his younger brothers, he did not think it was possible that any claim could have been made to these premises by the said George Nixon in his life-time, or by his children since his decease, without his having heard of same.

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An account-book of an agent of the family was produced, whereby it appeared that in 1819, twelve years' arrear of rent out of these premises had accrued: but it was also shown that this arrear had been afterwards paid. In addition to these facts, it was stated that the lease under which the premises were held by the lessees expired in 1841.

The Master, having overruled the purchaser's objections, reported in favour of the title. To this report exceptions were taken on the part of the purchaser. The *case was argued at the Rolls on the 14th of January, 1843, when his Honour was pleased to allow the exceptions.

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From this order the present appeal was brought by the plaintiff.

Mr. James Scott and Mr. Sproule in support of the appeal. * * *

Mr. Serjeant Keatinge and Mr. Moore, contra, for the purchaser. * * *

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THE LORD CHANCELLOR :

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The question, which has been raised in this case, is one of great importance, and very considerable difficulty. I wish to state what my present impression is. It seems to be admitted that there is no necessity for having the heir-at-law of the original testator, Alexander Nixon, before the Court, except with a view to the present objection. The judgment, on foot of which the bill was

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filed, bound all the lands, of which the testator was seised ; but as the lands, the sale of which was the object of the suit, were charged with the debts in exoneration of other lands devised to the heir, and which he had elected to take, it was not considered necessary to have the heir-at-law before the Court in the first instance. The case then stands thus : the testator made his will shortly before he acquired the estate in question, and thereby, after devising certain lands in trust, for his eldest son, George Nixon, &c., gave all the rest and residue of his real estate among his six younger children, subject to the payment of his debts and certain charges. Shortly afterwards, in 1776, he obtained a conveyance of the property now in controversy. The debt in this case, being a judgment debt of the testator, would *under any circumstances be a charge upon the property in question ; for if the property passed under the devise of the residue, the judgment was charged by the terms of the will ; and if it did not pass, still the judgment was a charge upon the lands in the hands of the heir. The purchaser under the decree therefore would, at all events, have a good equitable title, because the decree, which directs the lands to be sold for the payment of that debt, was made in the presence of all the parties interested, and the estate was as much charged with the debt, whether you look to the nature of the debt, or the rights of the parties, if it descended to the heir, as if it passed under the devise of the residue. The decree, therefore, gives an equitable title to the purchaser as much as any decree can ; and if it should turn out that there had been a pre-existing contract for the purchase of these premises, then I apprehend that the purchaser would have a good equitable title under the younger children, to whom the property would pass by force of the will, unless there was something in the frame of the conveyance to prevent this, the introduction of a different set of limitations, for instance : this, however, is a very subtle doctrine, and as the fact of such previous contract has not been proved, it is unnecessary to dwell more upon it. I shall, therefore, suppose that the acquisition was altogether subsequent to the date of the will.

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The first objection raised on the part of the purchaser is, that the question, whether or not this property passed under the will, the question, in fact, of adverse possession, upon which the plaintiff now relies, is not raised by the pleadings, or put in issue in the cause. I cannot admit that objection. The estate was, under any view of the case, subject to the plaintiff's charge, and being so, a

purchaser *could never, in this Court, be permitted to object that one denomination of lands, equally liable with others to a debt, was sold in preference to another. Therefore, there is a good equitable title, which can be conveyed to the purchaser in any event. It is then said that the title does not depend upon a matter of record, but rests altogether upon mere affidavits, and I am asked, if the heir-at-law were to bring an ejectment within ten days after the purchase, whether these affidavits could afford the purchaser any defence? I must say, certainly not. The affidavits here would in a court of law be waste paper. But this Court is frequently obliged to act upon facts making out a title, which have been proved by affidavit, which constitute a title only in this Court. But if the party had chosen to have a more solemn mode of establishing these facts, he could have required it. The purchaser was not bound to accept the affidavits in proof of these facts. He might have insisted upon having a regular examination of witnesses, in the usual manner in which any other question of fact is proved in the Master's office. The mode of proof therefore in this case rests entirely on the purchaser's consent. Courts of equity frequently compel an acceptance of a title resting on affidavits; for instance, on questions of identity: the Court must, of course, in such cases, act with great caution, and ought to be satisfied, before it compels a party to take such a title, that the facts as proved are such as to sustain the title, in the event of any adverse claim being set up.

In this case there is really nothing in controversy. There are no conflicting statements; everything has been proved (and there has been no attempt at denial), by the agent, and by a person, who appears to have acted as a bailiff *to the family. It appears, that on the death of the testator in 1791, his six younger children entered into possession of the premises, and so continued until the death of the eldest son, George, in 1819, and in like manner have remained in the undisturbed enjoyment of these premises, until the present time; undisturbed, I mean, so far as any claim on the part of George's heir-at-law is concerned. Some comments have been made upon one of the documents in this case. It is said that there has been no such receipt of rent as is sufficient to give a title under the statute. But the Act itself puts an end to any difficulty on this point. Under the old law no man, by mere wrong, could acquire a right. A receipt of rent was no ouster. There was, besides, no divesting of estate, the remedy was barred, but not the right to the estate. The late Act professed to deal with such cases,

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and it provided, that the wrongful receipt of rent should be deemed equivalent to actual possession of the estate. It was urged, that there was not here such a continued receipt of rent, for that the agent, Mr. Scott, in 1821, recovered an arrear of rent from some of the tenants, for twelve years I think; but this amounts to nothing. The parties went into possession in 1791, and remained in the undisturbed enjoyment until the death of the eldest son in 1819. There was a receipt of rent for all this period. The circumstance, that some of the tenants fell into arrear, and that their rents were permitted to lie unpaid for a number of years, the whole of which arrear was subsequently paid, cannot make any difference; the statute did not mean a compulsory half-yearly payment of rent, one half-year within the other, it looked only to a regularly continued possession. The question under the statute is, by whom was the rent received, and in what character? The fact here is proved, that the rent was received from the *death of the testator by the parties, who were not entitled to it, with the knowledge of the party who was entitled, and who was of full age and acquainted with his rights. I cannot, therefore, but think, that in this case there has been a sufficient receipt of rent within the statute to create a title.

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It was said, that for aught that appears, the eldest son might have permitted the rent to be received by his younger brothers, and that in such case there would be no wrongful receipt, and, therefore, no adverse possession. But to this I cannot accede. The new statute is so singularly framed, that this difficulty flows from it. Suppose a man to enter into possession by permission of the true owner, and without payment of rent, and to give an acknowledgment in writing of the title; from that moment the possession becomes adverse, and time begins to run, and instead of the real owner having an admission of title, upon which he may rest, the effect is the very reverse; the adverse possession, in fact, commences, and the statute begins to run. In such cases, therefore, where the operation of the statute is so powerful, parties must be careful to get such new acknowledgments, from time to time, as will admit their title, and thus preserve the right. In this case there is no reason whatever for supposing that the rent was received by the permission, or with the assent, of the eldest son. There is nothing in the case to lead me to say, that the receipt of rent by the younger children was a receipt by the heir-at-law himself, for to this length the argument must be pushed. I observe that actual

conveyances of parts of the property have been from time to time made by those younger children, and these appear upon the abstract, thus proving a clear adverse possession, and excluding anything like a presumption in *favour of the eldest son: even looking at the Act itself, it will be seen that there is no exception in it of a possession by permission of the right owner. The case, then, is reduced to a simple question of law, can this Court compel a purchaser to take a title depending upon parol evidence of adverse possession, under the new statute? Under the old statute it was long undecided whether a purchaser could be forced to take such a title, but ultimately it was so determined, and I apprehend, that it was quite settled, that a clear title, and just as good as any other title, might be acquired by adverse possession, and that a purchaser would be bound to take such a title. Then came the new statute, which intended to put the title upon higher, certainly not upon lower, grounds. I have heard nothing to displace the observation which has been made, that that statute does not operate by a mere bar of the remedy, that it does not work so imperfectly, it bars the estate itself; and if so where can the right be but in the person, whose possession the statute prevents from being interrupted. I am clearly of opinion, that by the effect of the statute, after the proper period of limitation has passed, the legal fee-simple is in the party, who has been in possession during that period, and that he is competent to convey it to another.

It was attempted to bring the case within the fifteenth section, for that, supposing the possession was not adverse at the death of George, the eldest son, as his heiress-at-law was a minor at such period, she would have had five years to institute proceedings, from the time she attained her full age. But there is no saving of minority in this section. My impression is, that whenever the right is barred by time, a good title can be made; that the party in possession has the legal fee simple, and the purchaser will be bound to take such title. I have stated my general views upon *the question, but considering its very general importance, I mean to look into the case with great care, before I finally dispose of it, and I should wish to have abstract of title and copies of the two affidavits, and of the original bill.

THE LORD CHANCELLOR:

I am not surprised at the conclusion that was come to in the Court below, there having been already two bills filed, to each of

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which the heir-at-law of the original testator was made a party defendant, but no claim was set up by the heir to the lands now in question, and as a bill of revivor could have been easily filed, for the purpose of bringing the present heir-at-law before the Court, such a course would have removed all difficulty. I should be inclined to agree with this view, were it not that I should then be obliged to decide, that the concurrence of the heir-at-law was necessary to give effect to the conveyance to the purchaser.

What then is this law of this Court on questions of this kind? The Court has to consider, first, whether *de facto* a title has been made out, and secondly, whether there is sufficient evidence of title to satisfy the Court, before it obliges an unwilling purchaser to accept the title. With regard to the first, it is a matter of perfect indifference how the title is made out, provided the purchaser gets a title, whether it be by escheat, abatement, disseisin, intrusion, or possession and non-claim, or destruction of contingent remainders, is a matter of no consequence, provided there be a valid legal title; whether the evidence is sufficient is a different question. It was said in this case, that the Statute of Limitations only operated as a defence, but never *could be held to confer a title, and I was asked, where, or in whom, was the legal title? I reply, that the statute has executed a conveyance to the party, whose possession is a bar. The statute makes the title, for by its operation it extinguishes the right of the one party, and gives legal force and validity to the title of the other, the party in possession. What does the purchaser require in this case? That the heir-at-law of the original testator should join in the conveyance to him, in order to release any right he may have, by way of extinguishment; but the statute has, by its own force, not only extinguished any right which the heir could have had, but has transferred the legal fee simple to the party in possession, for the legal estate must be in him, whose possession has barred the right of every other person.

Try the case by this test. Suppose the estate in the possession of the purchaser. I ask, would it not have all the incidents which belong to a fee simple? Could not the purchaser deal with it just as he pleased? He could make a lease, execute a settlement, grant a mortgage, sell the fee, or dispose of it by his will. If he died intestate, it would descend as real estate. He might maintain an ejectment against all the world; against the very claimant, whose estate the property originally had been. His title, therefore, is a fee simple in possession. I entertain no doubt upon this point,

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though, from that deference which is justly due to the opinion of his Honour, and the importance of the question, I have been led to consider it with the greatest care.

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As regards this particular title, nothing can be stronger. It does not depend on the affidavits alone, although they are conclusive as to the continued receipt of rent, and by the *statute, the receipt of rent is put on the same footing with possession ; but I find from the abstract, that there have been conveyances executed by the younger children of portions of this property, in some of which the heiress-at-law joined as representing a trustee, and by a deed of the month of June, 1840, she conveyed her one-sixth of this very denomination, to which she became entitled in consequence of the death of one of the sons, intestate and without issue. This title, therefore, rests upon actual conveyance, and I think this is a case, in which a jury would be directed to presume a conveyance from the heir-at-law, in order to give validity to the will of the original testator. If then there were no other grounds, I think I should be fully borne out in saying, that the title would be in this way supported. But it is not necessary to resort to this ground, for I am clearly of opinion, that this title has been sustained upon the first ground. It is in vain to seek to apply the rule as to doubtful titles to this case. The Court must deal with difficulties of title. It is every day required to decide upon difficulties of conveyance, and the construction of complicated limitations, and although it is quite true, that a purchaser will never be compelled to take a doubtful title, still the Court must decide, whether the doubt is of such a nature as may expose the purchaser to the probability of litigation and consequent danger. In this case I have the satisfaction of knowing, that the purchaser cannot incur the slightest risk ; his equitable title is complete, for the plaintiff's right bound the estate in the hands of all parties, and the heir-at-law was before the Court at the time of the sale. A better equitable title there could not be ; but the purchaser is not bound to take an equitable title. My opinion, however, is, that the title has been, by the operation of the statute, clothed with the legal estate, and therefore that he is bound to take it.

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O'CONNELL v. M'NAMARA (1).

(3 Dr. & War. 411—413; S. C. 2 Con. & L. 266, n.)

A party seeking to have the benefit of a former decree, must be prepared to show that such decree is right; for the Court will not carry the decree, if it appear to be erroneous, into execution.

In this case a decree of 1814 declared the consolidated sum, for principal and interest, upon foot of a portion provided by settlement for younger children, to be well charged upon the lands in the decree mentioned: and directed the interest to be thenceforth calculated upon this consolidated sum. Upon a bill filed by the plaintiff, in whom this charge had become vested, the Court refused to give him the benefit of the decree, unless he consented to waive his claim to interest on the consolidated sum.

By a certain indenture of settlement, bearing date the 1st of July, 1777, and executed on the occasion of the marriage of Thady M'Namara and Elizabeth his wife, a sum of 3,000*l.* was provided for the younger children of the marriage. John M'Namara, as one of such younger children, became entitled to one-fourth of said sum, amounting to 750*l.*; and by a certain decree bearing date the 14th of December, 1814, and made in the cause of *Cox v. M'Namara*, a sum of 950*l.* 1*s.* 2*d.*, being the amount then due for principal and interest upon the said sum of 750*l.*, was declared to be well charged upon the several lands and premises comprised in the settlement of the 1st of July, 1777, and was decreed to be paid, with interest until paid.

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The rights of John M'Namara having become subsequently vested in the plaintiff in this cause, he filed the present bill, praying that he might be declared and entitled to the benefit of the decree of 1814, and for payment of the sum due on foot of his charge and the said decree.

Mr. James O'Brien, on the part of the defendant, submitted that the decree of 1814 was erroneous in directing interest to be calculated upon the consolidated sum; and that the Court ought not to carry into execution such an erroneous decree; and cited *Hamilton v. Houghton* (2), *Burke v. O'Malley* (3), and *West v. Skip* (4).

The Solicitor-General and *Mr. Monahan*, for the plaintiff.

THE LORD CHANCELLOR:

I do not understand the rule to be, that this Court is bound to carry into execution an erroneous decree: on the contrary, I

(1) *Hatton v. Harris* [1892] A. C. 547, 562, 62 L. J. P. C. 24.

(3) 1 Beatty, 96, 121.

(4) 1 Ves. Sen. 239, 241.

(2) 21 R. R. 65 (2 Bligh, 169).

apprehend, that when a party comes into this Court, asking for the benefit of a former decree, he must be prepared to show, if the case requires it, that such decree was right. In *Hamilton v. Houghton* the error lay in the original decree of 1780; the appeal in that case, however, was only against the decree which carried that original decree into execution; but there was no appeal from the original decree itself. Lord ELDON, in moving judgment, observed, "that the original decree *appeared to be one, the benefit of which could not be had in that suit;" and he concluded by saying, that "under the circumstances of this case, it appears to me, that we can do no more than displace all those decrees, with liberty to the party to go before the Court again, and amend these pleadings, if he shall be so advised:" and accordingly the cause was remitted back to the Court of Exchequer, with an order to that effect. It is true that as this case now comes before the Court, I cannot order the decree to be amended; but as I am not bound to carry on or perpetuate error, I will not give the plaintiff the benefit of the former proceedings, unless he consents to take the proper decree.

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The decree accordingly declared the plaintiff entitled to the benefit of the decree in the pleadings in this cause mentioned to bear date the 14th of December, 1814, and which was pronounced in the cause formerly pending in this Court, wherein *Maria Cox* was plaintiff, and *Thady M'Namara* and others were defendants, save so far as the said decree gives interest on the consolidated sum of 950*l.* 1*s.* 2*d.*; and let interest on the sum of 750*l.* hereinafter mentioned, be computed at 5*l.* per cent. only: &c. &c.—Reg. Lib. 87, fol. 162, 1843.

GERRARD v. O'REILLY (1).

(3 Dr. & War. 414—435.)

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Jan. 30, 31.
Feb. 2.

A lessee covenanted, during the continuance of the demise, not to raise or extend a certain building, under the penalty of double the yearly rent reserved in the lease, the same to be recovered by distress or otherwise, in the same manner as the said yearly rent: Held, that this double rent was in the nature of liquidated damages for a breach of the covenant, and not a penalty, properly so called.

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This Court will not, in case of alleged acquiescence, act on light grounds against the legal rights of parties; there must be either fraud, or such

(1) *Weston v. Metropolitan Asylum District* (1882) 9 Q. B. Div. 404, 51 L. J. Q. B. 399, 46 L. T. 580.

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acquiescence, as, in the view of this Court, would make it a fraud afterwards to insist upon the legal right.

The rule, which affects a party with notice, where his solicitor has had notice in the same transaction, or so recently that it is impossible to suppose he could have forgotten it, is in itself sound, but should not be carried too far.

THOMAS GERRARD, the plaintiff's father, and Christopher Cusack, being seised, the former of the lands, mill, kilns, and weirs of Liscarton, situated on the right bank of the river Blackwater, with half the bed of said river; and the latter, of the lands of Ratheldron, which lay on the left bank, with the other half of the bed of the river: by indenture bearing date the 21st of October, 1821, the said Thomas Gerrard demised the said mill and weirs of Liscarton, and his half of the bed of the river, to Christopher Cusack, for three lives, or thirty-one years, to be computed from the year 1817, whichever of said terms should last the longer.

At the time of this demise, and for many years previously, there had been a natural island in the river, which ran along the tail-race, and past the head-race of the mill, against the current diagonally: this island was continued by a stone weir, till it reached the centre of the river, a distance of about five yards; and from the extremity of the stone work, at right angles to it, a temporary wicker weir was extended across the river to the Ratheldron bank, leaving the water free to flow down to the mill, between the island, and the Liscarton, or right bank. At the distance of half a mile above the mill, a stream named the Donagh, flowed into the Blackwater, intersecting the left bank, and separating the lands of Ratheldron from those of Mullahard, which were the property of a person named White.

[415] In 1828 Christopher Cusack died, having, by his will, appointed his widow, Maria Anne Cusack, his executrix and residuary legatee.

By indenture, bearing date the 10th of June, 1829, Maria Anne Cusack, conceiving herself entitled to all Christopher Cusack's interest in the lease of 1821, affected to sub-let the premises comprised in that lease to William Gerrard, the plaintiff in the present cause. This indenture was expressed to be a demise for the term and subject to the rents and covenants of the lease of 1835 subsequently mentioned.

William Gerrard entered into possession under this instrument; and in 1830, expended a sum of 2,000*l.* in converting the temporary weir above mentioned, into one of a more permanent character, strengthened with stone piers.

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In 1835 it was discovered, that Maria Anne Cusack had not any title enabling her to grant the lease of 1829, and that Marcella Cusack, the sister of the testator Christopher Cusack, was entitled to one moiety absolutely, and to the other moiety for her life, with remainder to Richard and Adelaide Kearney. Marcella Cusack, and the Kearneys, considering the expenditure of William Gerrard, agreed to grant him a lease upon the same terms as those contained in the void lease of 1829; and accordingly, by indenture dated the 4th of March, 1835, made between Maria Anne Cusack of the first part, Marcella Cusack, Richard Kearney, and Adelaide Kearney of the second part, Thomas Gerrard of the third part, and William Gerrard of the fourth part; after certain recitals, it was witnessed, that the said Marcella Cusack, Richard and *Adelaide Kearney, demised the said premises to William Gerrard for sixty-one years, from the 1st of November, 1828, at the rent of 80*l.* per annum. And by this deed, William Gerrard covenanted as follows, viz. (1): "That he the said W. Gerrard, his executors, administrators, or assigns, shall not, during the continuance of this demise, extend, raise, or cause, or permit to be extended or raised, the stone weir now erected on the river Blackwater, leading to the said mill, under the penalty of double the yearly rent hereinbefore reserved, to be recovered by distress or otherwise, in the same manner as the said yearly rent. And it is hereby further covenanted and agreed upon, by and between the said parties hereto, that it shall and may be lawful to and for the said W. Gerrard, his executors, administrators, or assigns, to erect, or cause to be erected, whenever he or they may see occasion so to do, a temporary wicker weir, from the extremity of said stone pier in the centre of said river, to reach to the bank or ground on the lands of Ratheldron, on the opposite side from said mill; and shall and may from time to time, and all times hereafter during the continuance of this demise, repair and keep up such temporary or wicker weir, if he or they shall think proper so to do, and at his and their own proper risk and peril, for any damage, which may or shall be occasioned by throwing back water, or otherwise injuring said lands of Ratheldron, or any other lands." And the indenture then proceeded thus: "And whereas, since the execution of the said lease of the 18th of June, 1829, the said William Gerrard has erected, or caused to be erected, a temporary or wicker weir from

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(1) These covenants were copied from counsel's briefs, as the editors were unable to see the deeds.

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the extremity of said stone weir, *in the centre of said river, to the said lands of Ratheldron, on the opposite side of said mill; and whereas, it is alleged, that the said temporary or wicker weir, from time to time, has damaged and injured the lands of Ratheldron, and also the lands of Mullahard, and other lands: now the said William Gerrard, hereby for himself, &c., covenants and agrees to and with the said Marcella Cusack, Richard Kearney, and Adelaide Kearney, &c., to be responsible for any risk, damage, or injury, which may already have been done, or may hereafter occur to the said lands of Ratheldron, or Mullahard, or said other lands, by the temporary or wicker weir, which hereafter may be erected, or be caused to be erected by the said William Gerrard, his heirs, &c., from the extremity of said stone weir to the said lands of Ratheldron." This lease was prepared by solicitors named Messrs. Young and O'Reilly.

Christopher Cusack was largely indebted at the time of his death, and shortly afterwards one of his creditors, named John S. Blount, filed a bill for a sale of his estate, and John Ball was appointed receiver over the lands of Ratheldron. In this cause Flemyng P. O'Reilly (the present defendant) came in as a judgment creditor, and proved his demand before the Master; Messrs. Young and O'Reilly acted as his solicitors.

[*418] John Ball, the receiver, in 1836 submitted a statement of facts to the Master. This statement set forth, amongst other things, the leases above mentioned, and alleged, that in 1880, or 1881, William Gerrard had built a stone weir, three or four feet high, across the entire bed of the river, whereby the lands of Ratheldron were greatly injured by floods, and the receiver proposed under these circumstances *that a surveyor should be directed to investigate the cause of the floods, and that a case should be laid before counsel to obtain advice as to the proceedings which should be taken for redress. The Master, however, declined to direct any proceedings against William Gerrard, without an order of the Court. It appeared, that this statement was prepared by Messrs. Young and O'Reilly, who were solicitors for the receiver.

In Hilary Term, 1887, Mr. White brought an action on the case against William Gerrard, for alleged damages, by reason of the overflowing of the lands of Mullahard, then in his occupation. Young and O'Reilly were White's attorneys in this case.

Pending this action, Young was appointed receiver in the room of J. Ball, and made an application at the Rolls, founded on the statement of facts above mentioned. Upon this motion his Honour

made no rule, William Gerrard's solicitor stating, that the same question was involved in the cause of *White v. Gerrard*.

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The case of *White v. Gerrard* was tried at the Spring Assizes in 1837, and a verdict was found for the defendant, the jury being of opinion, that the injury was not occasioned by the weir, but by natural causes, viz., a shoal in the river, and certain windings in its banks. However, a new trial was directed, but, by consent, the case was referred to three eminent engineers, to ascertain and determine, how the injury done by the weir, if any, could be remedied. On the 30th of August in the same year, the engineers made their unanimous award, and thereby directed, that a channel should be cut through the shoal, *that the then existing weir should be removed, and in lieu thereof, a new stone weir, of a certain length and description, erected, and new sluices constructed. Upon this award being published, William Gerrard caused it to be served on all the parties in the cause of *Blount v. Cusack*, and accompanied it with a notice, in which he stated, that his object in serving the award was to have the permission of all persons interested in the matter, to carry on the works mentioned and recommended in the award. The award was not served on the receiver in the cause.

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On the 7th of June, 1838, the lands of Ratheldron, and all Christopher Cusack's interest in the mills of Liscarton, were sold in the cause of *Blount v. Cusack*. The rental and particulars of sale did not contain any reference to the award (1). Flemyng P. O'Reilly became the purchaser. Objections were, however, taken to the title, but not being overruled until July, 1839, the sale was not confirmed, nor the conveyance executed, until some time in the year 1840.

It appeared that in July, 1838, F. P. O'Reilly went to see the purchased lands; that on that occasion he saw William Gerrard's men on the Ratheldron bank, engaged in the execution of the works directed by the award, and that he did not make any objection. It also appeared, that a conversation took place in the year 1838, between the receiver in *Blount v. Cusack* and Samuel Gerrard, a brother of William Gerrard, in which the receiver said laughing, "That this is a very fine weir you are building; we will be going down some fine morning to throw it down;" to *which Samuel Gerrard replied, "If you attempt it we will give you a cold bath in the river; however, the worst you can do will be to bring an action for the double rent, and we have the advice of counsel, that we shall not incur that liability." It further

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(1) The rent payable by William Gerrard was stated to be 80*l.* per annum.

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appeared, that F. P. O'Reilly had cautioned the receiver not to accept the single rent; but that the Master had directed the receiver to take it, inserting in the receipt these words, "without prejudice to the purchaser's claim for double rent." This receipt William Gerrard declined to accept.

In Hilary Term, 1842, Flemyng P. O'Reilly commenced an action of covenant against William Gerrard, whereupon the present bill was filed by the defendant [at law] against the plaintiff at law. The bill prayed, that the plaintiff might be declared entitled to hold the premises comprised in the lease of 1835, at the single rent therein reserved: or that an issue might be directed to try whether any injury had been done to the defendant, F. P. O'Reilly, by the extension of the Liscarton weir, and, if any, what was the amount of such injury; and that upon payment of that amount with the single rent, the plaintiff should be declared entitled to hold the premises in their present state: or that the plaintiff should be declared entitled to enter and remove the said weir, and erect a wicker weir in place thereof and upon payment of the penal rent mentioned in the lease of 1835, up to the time of such removal, to hold the premises subject only to said single rent, and for an injunction to restrain the proceedings at law.

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The injunction was granted upon an application to the *Master of the Rolls, and was subsequently continued to the hearing, which now came on.

Mr. Moore, Mr. Wm. Brooke, and Mr. Battersby, for the plaintiff.

Mr. Serjt. Warren and Mr. Francis Ball for the defendant.

Mr. Battersby, in reply :

The plaintiff is entitled to relief, firstly, because the double rent is reserved expressly as "penalty," and not as liquidated damages. Secondly, because this is the case of a collateral object secured by a penalty. Thirdly, because the plaintiff purchased, by the award and outlay in execution of it, liberty to do the act, and to this award the owners of the reversion, now represented by the defendant, were at the time, impliedly at least, parties. And, fourthly, because the defendant himself had express notice of the work being commenced for his benefit; he saw it in progress and acquiesced in it, he has reaped the advantage of it, and to demand the penalty in addition,

is to attempt a fraud. [On the first two points *French v. Macale* (1), *Kemble v. Farren* (2), *Harrison v. Wright* (3), *Davies v. Penton* (4), *Smith v. Dickenson* (5), and other cases were cited.]

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The evidence in the cause shows, that not only was the defendant aware of the works in which the plaintiff was engaged, but that he acquiesced in, and actually encouraged, their erection. This encouragement is sufficient to entitle him now to the interposition of the Court in restraining the defendant from asserting his legal right. [On this point *Jackson v. Cator* (6), *Dann v. Spurrier* (7), *Williams v. The Earl of Jersey* (8), and other cases were cited.]

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THE LORD CHANCELLOR:

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This case has been very well argued by the plaintiff's counsel, but his bill cannot be sustained. The first question raised related to the construction of the covenant in the lease, and I am clearly of opinion that the case is not one of a penalty, but of a double rent. All the authorities upon this subject have been so recently under my consideration (9), that I do not feel it necessary to examine them again. There is nothing in the peculiar nature of this covenant to induce me to think that a penalty was meant; it is true that it speaks of "penalty," but this, though perhaps a circumstance entitled to some weight, is certainly not conclusive. Now a double rent is provided expressly, and is to be recovered by distress; for as the law gave a power of distress for the single rent, so this covenant provided that the double rent should be recovered by distress. This power of distress implies the relation of landlord and tenant, and therefore rent was meant in the strict sense of the term: in the event mentioned in this covenant the single was to be turned into a double rent. If the party thought that this was the case of a penalty, why did he not try the question at law? It is altogether a mistake to suppose that there is one rule at law, *and another in equity. I am bound to give this lease the same construction which it would receive in a court of law. If the party thought this a penalty he should not have discontinued his action at law, and come into this Court for a peculiar construction of this covenant. In my opinion, this covenant merely amounted to the

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(1) 59 R. R. 675 (2 Dr. & War. 269). 602.

(2) 31 R. R. 366 (6 Bing. 141; 7 Bing. 83).

(3) 12 R. R. 369 (13 East, 343).

(4) 30 R. R. 298 (6 B. & C. 216).

(5) 3 Bos. & P. 630; see 17 R. R.

(6) 5 R. R. 144 (5 Ves. 688).

(7) 6 R. R. 119 (7 Ves. 231).

(8) 54 R. R. 219 (Cr. & Ph. 91).

(9) *French v. Macale*, 59 R. R. 675

(2 Dr. & War. 269).

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reservation of a double rent in a certain event, and, consequently, on the first ground at least, this bill cannot be sustained.

As to the question whether the defendant had knowledge of the fact of the going on of the works, and as to the consequence of such knowledge, one would have almost supposed that Mr. Young, and not Mr. O'Reilly, was the defendant, and that relief was sought against the former. It is certainly true that you may prove that a solicitor has had notice in the same transaction, or so recently that it is impossible to suppose he could have forgotten it, and then hold that the party himself had notice in effect (1). This is a rational rule; "for otherwise," as Lord HARDWICKE once observed (2), "a man, who had a mind to buy another's estate, might shut his own eyes and employ another to treat for him." The rule or principle is, in itself, a sound one, but it must not be carried too far.

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It appears that Mr. Young, who was the receiver in the cause of *Blount v. Cusack*, had his attention drawn to the damage, which was alleged to have taken place before the award was made, just as White's attention had been drawn to the like damage as to his lands. White had commenced an action at law, and Young came before the Court and asked for a reference to ascertain the damage, *and also for an inquiry as to the breach of covenant; but the MASTER OF THE ROLLS very properly refused the application, observing, that as the action at law between White and Gerrard was going on, there would be no use in the reference. So far it was plain enough; but White, when about to try the action, seems to have become apprehensive as to the result. He entered into a compromise, and accordingly a reference was made to the arbitration of three engineers, gentlemen of respectability and skill, and with their award there is no fault to be found. They directed a stone weir to be built across the whole river; this would have obviated the difficulty before them, but it so happened that there was a particular covenant in the lease, prohibiting the very act which the engineers had directed to be done, and, of course, they could not absolve the plaintiff from his covenant: they knew nothing about this covenant, but he was well aware of its existence. Notice of this award was served on the parties in the action, but was not served on Young, although it should have been, for he was receiver in the cause, and had made the motion in 1837. This notice, which was addressed to each party, says—"I send you the

(1) See *Fuller v. Benett*, 2 Hare, 394.

(2) *Attorney-General v. Gower*, 2 Eq. Ca. Abr. 685.

award, that I may have your consent," &c. Now, if he thought it was necessary to have this consent, why did he not wait for it? He should have informed this Court of the state of circumstances, and asked it to give efficacy to the act of the arbitrators. On such an application the Court would have directed a reference to the Master, for the purpose of ascertaining whether it was for the advantage of the parties that such consent should be given: and on the Master's report that it was right, the application would have been acceded to. He would, therefore, have obtained that consent if he was *entitled to it; but he seems to have been anxious to avoid asking for the consent, because he saw that course would lead to an investigation, which he thought might be unfavourable to him. Now I am asked to bind not only the seller but the purchaser: but if ever there was a case, in which a party was bound to come into Court and ask for its consent to a proceeding, this is that case. The purchaser had a right to come in and buy, and to take advantage of the covenant; but the imposition of the double rent was to prevent the doing of the act; the object was to sell with the benefit of the covenant, but the purchaser could not have the benefit both of the double rent, and of the covenant not to do the act.

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But what was the conduct of the defendant? He became the purchaser in 1838; subsequently he did not like the title, and tried to get rid of his bargain, but he failed in his attempt, and in 1839 was fixed with the title. However, before the sale was confirmed, as is very usual, he went down, with his family, into the country to look at his purchase. He then saw the works going on, but he did not attempt to interfere, and this, it is said, amounts to acquiescence binding on him. But he had not completed his purchase at the time, and if he had presumed to interfere to stop the works, they would have laughed at him; and besides this want of right on the part of the purchaser, the lessee was entitled to do the act upon condition of paying the double rent: and this is just what would have been said, if he had interfered.

It must not be understood that this Court will, on light grounds, act against the legal rights of parties in cases like the present. There must be fraud, or such acquiescence, *as in the view of this Court would make it a fraud afterwards to insist upon the legal right. The case of *Macher v. The Foundling Hospital* (1) was a very hard case, and it was strenuously argued at the Bar; yet Lord

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ELDON denied the relief generally. This shows that it requires a very strong case to induce this Court to deprive a man of his right at law to prevent a particular act from being done, or his right to receive damages, if it be done. No act has been shown in this case amounting to such acquiescence; on the second ground therefore the bill cannot be sustained.

Jan. 31.

On the following day the LORD CHANCELLOR again mentioned the case, and said, he considered that there was not any remedy for the difficulty under which the plaintiff laboured; and that even if he could have looked upon the reservation as a penalty, he could not give any relief except upon the condition of the abatement of the nuisance.

An offer having been made on the part of the defendant in conformity with the relief sought in the third alternative of the prayer of the bill, and the plaintiff having agreed thereto, the decree was eventually drawn up as follows:

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By consent of both parties, declare the plaintiff liable to pay to the defendant double rent for the lands and premises in the pleadings mentioned, from the 1st of November, 1839: let the plaintiff be at liberty to remove the weir on or before the 1st of November next; and in case he shall remove it then, let the double rent cease from the day of such removal. Let the plaintiff pay to *the defendant all his costs of this suit; and upon payment of the double rent up to the 1st of November next, and the defendant's costs, then let the recognizance entered into by the plaintiff be discharged: with liberty to either party to apply to the Court on the first day of next Michaelmas Term, if there shall be occasion.—Reg. Lib. 87, fol. 169, 1843.

1843.
Feb. 13.

BARTON v. HASSARD.

(3 Dr. & War. 461—463.)

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An executor contracted with legatees for the purchase of their legacies, which were accordingly assigned to a trustee for him, in consideration of sums of money less in amount than the legacies. It was admitted that the transaction could not be sustained for the benefit of the executor: Held, that the deed of assignment did not operate as a release of the estate, and could not be upheld as against the legatees, who executed it, for the benefit of their co-legatees.

RICHARD HASSARD, the testator in this case, by his will, dated the 26th of January, 1813, bequeathed legacies to Sarah Hassard, Frances Hassard, Jane Fiddes, Mary Jane Nixon, and several

other persons, and appointed George Hassard, Jason Hassard, and William Hassard, his executors.

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George Hassard alone proved the will, and acted under its trusts ; and on the 19th of December, 1815, the present suit was instituted for the administration of the testator's estate.

After the filing of the bill, George Hassard alleged that the assets would not be sufficient to satisfy the debts and legacies of the testator ; and by means of this representation induced the legatees above-named to compound with him for their legacies. Accordingly, by indenture dated the 29th of November, 1820, the said named legatees assigned their respective legacies to a person named George Williams, as the trustee of George Hassard. These assignments were made in consideration of sums considerably less in amount than the legacies, to which the several assignors were entitled.

The Master, by his report, after stating the foregoing facts, found that the executor, George Hassard, had not any power enabling him to enter into the contract contained in the deed of 1820, for his own benefit, and submitted as a special point for the consideration of the Court, whether the said legatees were bound by their *contracts so as to be entitled, upon foot of their legacies, merely to the sums, which they had agreed with the executor to take in satisfaction of their legacies, or whether they were to be considered entitled to the full amount of their bequests.

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The *Solicitor-General*, Mr. Monahan, and Mr. J. J. Murphy, for legatees not parties to the deed of 1820, contended that the estate of the testator was entitled to the benefit of the contract of 1820, and that the deed operated as a release of the estate. *Ex parte James* (1) was referred to.

Mr. Serjt. Keatinge and Mr. James Haire for the legatees who had assigned their legacies.

Mr. Moore, for the executor, George Hassard, admitted that the purchase could not be sustained.

THE LORD CHANCELLOR :

This case comes before the Court in a very irregular manner ; and I shall take some steps to put an end to this inconvenient practice of reporting special points.

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It appears that some twenty-three years ago George Hassard, the executor, represented the testator's assets as an insufficient fund to meet the full amount of the debts and legacies; and that some of the legatees sold to him their legacies for sums considerably less in amount. The deed, by which the transaction was carried into effect was not a release of the estate, but a direct and formal assignment *of the legacies in trust for the purchaser. The Master has rightly considered, that the executor could not sustain this purchase, which was clearly made by him in his fiduciary character; but persons, who were legatees, standing in the same interest with the legatees who sold their legacies, desire to have the benefit of the executor's purchase, and insist that they are entitled to treat the assignment as if it had been a release; and the question now is, are they so entitled?

As to the case of *Ex parte James* (1), which was referred to, the contest there was between the general creditors and the solicitor, who had made the purchase, and it stands upon grounds distinct from this case. If a man, who, like this executor, is invested with a fiduciary character, buys up an adverse claim, he at once becomes, in respect of that purchase, a trustee for the parties in whose behalf he is clothed with that character. But this executor's fiduciary character extended to all the legatees. Must I then not remit the legatees, who joined in the deed of assignment, to their former position? This Court cannot give effect to this deed against those legatees who assigned for the benefit of their co-legatees. There is no principle, upon which these co-legatees, who were no parties to that instrument, can insist on its being upheld for their advantage. The benefit of the purchase must belong to the persons who assigned, subject to the payment of the principal and interest paid by the executor. It is not like the purchase of an outstanding incumbrance at less than its value, which would enure to the benefit of the estate.

(1) 7 R. R. 56 (8 Ves. 337).

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(3 Dr. & War. 482—495; S. C. & Ir. Eq. R. 286.)

By deed executed in the year 1809 certain lands were conveyed, subject to the payment of a sum of money, which the grantee thereby covenanted with the grantor to pay to third persons: Held, that, notwithstanding the covenant, only six years' arrears of interest could be recovered. Held, also, that though by the deed of 1809 there was an obligation imposed, yet there was not a trust created.

1843.
Feb. 13, 14.SIR EDWARD
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By indenture bearing date the 23rd of January, 1809, and made between Thady Kelly of the one part, and his son, William Kelly, of the other part, after reciting several denominations of lands in the county of Sligo, and the several leases, under which same were held by the said Thady Kelly, the said deed witnessed that for and in consideration of the natural love and affection which Thady Kelly bore unto his son, William Kelly, and of ten shillings, and also for the other considerations thereafter mentioned, the said Thady Kelly granted and released all the said premises unto Wm. Kelly, his heirs and assigns, to hold the same subject to the payment of the head-rents and fines reserved and made payable by the several indentures of lease therein recited, and subject also to the payment of 260*l.* unto the said Thady Kelly in each and every year during his natural life, and also to the payment of 1,100*l.*, as and for the fortunes of Elizabeth Kelly and Anne Kelly, the daughters of Thady Kelly, on their respective days of marriage, in the following proportions; that is to say, to pay unto Elizabeth Kelly 600*l.* and unto Anne Kelly 500*l.*, in such manner and under such restrictions as Thady Kelly should by writing under his hand and seal, or by his last will and testament, direct and appoint: and the said William Kelly did thereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said Thady Kelly, that he, William Kelly, his heirs, &c., should well and truly pay unto the said Thady Kelly in each and every year, during the term of his natural life, the sum of 260*l.* sterling, by half-yearly payments: and *further, that he would well and truly pay unto the said Elizabeth Kelly and Anne Kelly the said sum of 1,100*l.* sterling, in such proportions as hereinbefore mentioned, in such manner and under such restrictions as the said Thady Kelly should direct and appoint.

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Immediately upon the execution of this deed, William Kelly entered into the possession of the lands and premises thereby conveyed; and in 1837 the said premises were granted, by way

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of mortgage, to the plaintiff in this cause, who was one of the public officers of the Agricultural Bank, to secure a sum of 2,000*l.*; the bill in the present cause was filed to raise the amount of that mortgage.

On the 16th of December, 1841, a decretal order was pronounced, whereby the cause was referred to the Master to take the usual accounts.

On the 18th of January, 1843, the Master made his report, and thereby, after stating the conveyance of the 23rd of January, 1809, and that William Kelly, immediately upon its execution, had entered into the possession of the said premises, found that Thady Kelly had died in the month of December, 1813, without having in any way appointed said sum of 1,100*l.*, or any part thereof: that on or about the 1st of January, 1822, Anne Kelly had intermarried with Edward M'Lester, and that upon such intermarriage the said Anne, and the said Edward M'Lester in her right, became entitled to the said sum of 500*l.* together with an arrear of interest thereon, amounting to the sum of 485*l.* 14*s.* 3*d.*, being the entire amount, at the rate of five per cent. from the 1st of January, 1822, to the date of the report.

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To this report an exception was taken on the part of the plaintiff, on the ground that the Master should not have calculated interest from the 1st of January, 1822, but should have reported that M'Lester and wife were entitled to interest upon said principal sum only for six years next preceding the filing of the bill.

The Solicitor-General and Mr. Serjt. Warren in support of the exception :

This case falls within the forty-second section of the statute 3 & 4 Will. IV. c. 27, and the Master ought to have reported that M'Lester and his wife were only entitled to an arrear of interest for six years prior to the filing of the bill. On the other side, it will be contended, that by the operation of the deed of the 23rd of January, 1809, an express trust has been created for the payment of this sum, and that consequently they are within the saving of the twenty-fifth section; or that, secondly, in consequence of there being contained in that deed a covenant on the part of Wm. Kelly to pay this sum, upon which the parties now entitled could, by the operation of the thirty-second section of the 3 & 4 Vict. c. 105 (1),

(1) By that section the English law of limitations respecting specialty debts (3 & 4 Will. IV. c. 42, s. 3) was introduced into Ireland.—O. A. S.

at any time within the period of twenty years, bring an action, this Court must follow the law, and hold the parties to be entitled to whatever amount of interest, they could have recovered under the covenant. * * *

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Mr. Monahan and Mr. H. G. Hughes in support of the report. * * *

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[The arguments of counsel and the principal cases cited by them sufficiently appear from the following judgment:]

THE LORD CHANCELLOR:

Feb. 14.

A very important point arises in this cause as to the operation of the Statute of Limitations. An estate is conveyed *by a father to his son, subject to a charge of 1,100*l.* for the portions of the daughters of the grantor, and the grantee covenants with his father that he will pay the amount in the manner therein mentioned. It was first argued that there was a trust thereby created, and therefore that the case was not within the operation of the statute: but there is no foundation for that argument. The estate was conveyed, no doubt, liable to that charge, but also subject to the payment of the head-rent and renewal fines reserved in the several leases, under which the premises in question were held. There is, therefore, no more a trust created for the payment of this charge, than there is for the payment of the head-rent and fines. There is, as I have already observed (1), an obligation imposed, but no trust created. I have, therefore, to consider the operation of the statute, 3 & 4 Will. IV. c. 27, and of the statute 3 & 4 Vict. c. 105, s. 32, as to the limitation of the right to bring actions upon specialties.

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By the fortieth section of the 3 & 4 Will. IV. c. 27, it was enacted, “that no action or suit shall be brought to recover any sum of money secured by any mortgage, &c., but within twenty years after a present right to recover the same.” That section, therefore, provides that the principal shall not be recoverable after twenty years, except in the several cases enumerated therein; then follows the forty-second section, which embraces only the interest of the sums provided for in the fortieth section. If, therefore, the law rested upon that Act alone, it is plain that a distinct remedy was intended to be provided for these two subjects; *that is to say, that though the principal sum itself might be recoverable within twenty years, yet only six years’ arrears of interest could

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(1) *Harrison v. Duignan*, 39 B. R. 689 (2 Dr. & War. 293).

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be recovered upon that principal sum. Therefore, that which was supposed at the Bar to have been so anomalous and inconsistent, was not so considered by the Legislature.

Then came the statute 3 & 4 Will. IV. c. 42, only in force in England, but the third section of which has been recently introduced into this country by the 3 & 4 Vict. c. 105, and this confines the period of bringing an action for rent or on a specialty to twenty years. Now a great deal of the difficulty, which has arisen upon the construction of these statutes in England, sprung from this circumstance, that the later Act, 3 & 4 Will. IV. c. 42, was not framed by the persons, who prepared the former Act. If the later Act had not passed, money secured on land, although also secured by bond or covenant, could not have been recovered after twenty years, nor could more than six years' arrear of interest have been recovered. The first Act provides for both cases. In *Doe v. Williams* (1), Mr. Justice LITLEDALE said, "The fortieth section relates to actions brought to recover the money, and those actions, in the case of mortgages, are either upon the covenant usually inserted in the mortgage deed, or on the bond, which commonly accompanies it." It never occurred to that very learned Judge, that the fortieth section did not apply to specialties. In *Paget v. Foley* (2), the Court of Common Pleas held, that rent reserved upon an indenture of demise was not within the operation of 3 & 4 Will. IV. c. 27, but fell within the 3 & 4 Will. IV. c. 42. Mr. Justice BOSANQUET, *to some extent, differed from the rest of the Court; he seemed to think that if the case had rested on the 3 & 4 Will. IV. c. 27, and that 3 & 4 Will. IV. c. 42, had never passed, the right to recover in that case would have been confined to six years, within the meaning of the 3 & 4 Will. IV. c. 27; but he agreed with the rest of the Court on the point, upon which they decided the case, that the 3 & 4 Will. IV. c. 27, was, in fact, removed or repealed by the 3 & 4 Will. IV. c. 42. It is a singular circumstance that the 3 & 4 Will. IV. c. 42, had, in fact, a prior operation to the 3 & 4 Will. IV. c. 27, although passed subsequently to it, and this statute (3 & 4 Will. IV. c. 27), when it came into force, found the 3 & 4 Will. IV. c. 42, in full operation. In Ireland, however, the law stands on a different footing; for the provision in the 3 & 4 Will. IV. c. 42, to which I have been adverting, was not introduced into this country, until it was embodied in the recent statute of Victoria; and it is to be

(1) 44 R. R. 421, 425 (5 Ad. & El.
291, 296).

(2) 42 R. R. 698 (2 Bing. N. C. 679).

regretted that it was thus introduced without some modification. The statute of Victoria found the 3 & 4 Will. IV. c. 27, in full operation in this country. My clear opinion upon the effect of the 3 & 4 Will. IV. c. 27, is, that it expressly applies, in a case like the present, both to the principal and interest, although the money is also secured by bond or covenant.

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In *Strachan v. Thomas* (1) there was a little more difficulty than in *Paget v. Foley*. That was the case of an annuity, which fell directly within the terms of the 3 & 4 Will. IV. c. 27; for in the first section, which is the glossary of the Act, the word "rent" is defined to *extend to all annuities and periodical payments. The learned CHIEF JUSTICE, however, in delivering judgment, merely said, "the present is not the usual case of reservation of rent upon a lease, and, so far, it is not properly an indenture of demise; it is a rent-charge, and, as such, falls within the forty-second section of the 3 & 4 Will. IV. c. 27: but notwithstanding that, we are of opinion that it falls within the third section of the 3 & 4 Will. IV. c. 42, as being an action of covenant on a specialty." Now this case went far beyond *Paget v. Foley*, which was held to fall within the provisions of the 3 & 4 Will. IV. c. 42; whereas, in the later case, the Court held that the case was within the 3 & 4 Will. IV. c. 27, and also within the 3 & 4 Will. IV. c. 42, by reason of the action being one upon a specialty. It appears to me that the two statutes, being *in pari materia*, should be construed together, and, if possible, reconciled. There is this important distinction between the case which I have to consider, and both *Paget v. Foley* and *Strachan v. Thomas*; in both of those cases there was but one subject, the rent in the one, and the rent-charge in the other: it was therefore impossible to say that there could be a recovery of the same subject both within twenty years and within six years. But in the present case I have to deal with two subjects, the principal sum secured, which is clearly within the fortieth section of the 3 & 4 Will. IV. c. 27, and the interest upon that principal sum, which falls within the forty-second section.

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It is singular that the Court of Exchequer in this country came to a different conclusion from the Court of Common Pleas in *Paget v. Foley*; for in *Bruen v. Nowlan* (2) *they held that the 3 & 4 Will. IV. c. 27, did extend to rent reserved upon an indenture of demise. There was then no conflict of statutes, for at that time there was no other statute in force than the 3 & 4 Will. IV. c. 27:

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(1) 12 Ad. & El. 536.

(2) 1 Jebb & S. 346, n.

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the statute of Victoria had not passed, and the 3 & 4 Will. IV. c. 42, did not extend to this country. I think the Court of Exchequer decided in that case rightly, and it agrees with the opinion of Mr. Justice BOSANQUET, to which I have already adverted. But the passing of the later Act opens to a different view.

In *Hodges v. The Croydon Canal Company* (1), before the Master of the Rolls, the question raised was, whether a mortgagee could recover more than six years' arrear of interest: in the mortgage there was no covenant for payment of the principal or interest. Lord LANGDALE held that the case was within the 3 & 4 Will. IV. c. 27; that the principal might be recovered within twenty years, but that the remedy for arrears of interest was limited to six. He said, "in this case there is no covenant, or engagement to pay; there is simply a conveyance of the canal. Is this then the species of action of covenant or of debt upon bond or other specialty referred to in the second Act? I think not, and that this case depends on the first Act; consequently no more than six years of interest can be recovered." It may be inferred, that if there had been a bond or covenant, the case would have been held to fall within the 3 & 4 Will. IV. c. 42; but that was not the point before the Court, and I only mention the case, that it may not be supposed to have been overlooked.

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In the argument before me, the fifty-third section of the statute of Victoria was referred to, and it was insisted that that must be held to govern the present case: however I think that argument received a satisfactory answer from the counsel on the opposite side, that the proviso was not intended to apply to a case like the present.

The question then is, does this Act of Victoria, in the particular case of a charge, or a mortgage, with a covenant for payment, enlarge the remedy of the creditor as to interest? I am of opinion that it does not. I think the case falls within the 3 & 4 Will. IV. c. 27, and that the right to arrears of interest must be confined to six years. I do no violence to the statute of Victoria by that construction. That Act was not intended to repeal the former one. There are many cases, in which the remedy provided by the statute of Victoria may come into operation, without breaking in upon the former statute. Both may, and ought to be construed together. The period of limitation is twenty years in each; and though there are savings in the one Act which are not to be found in the

other, yet it does not appear to me, that these provisions prevent me from holding that this case falls, as to interest, within the 3 & 4 Will. IV. c. 27.

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It is right to observe that the covenant in this case is not with the parties who are entitled to be paid, and this is important; for though the money might be recovered in an indirect course, yet the parties entitled could not support an action upon the covenant. I am of opinion that the claim here falls directly within the fortieth and forty-second sections of the 3 & 4 Will. IV. c. 27, which, in this respect, are not repealed by the thirty-second section *of the statute of Victoria, and that the amount of arrears of interest to be recovered must be governed by the forty-second section. The exception must, therefore, be allowed.

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ACHESON v. FAIR.

(3 Dr. & War. 512—527; S. C. 2 Con. & L. 208.)

1848.
Feb. 11, 13.

A testator bequeathed property in trust for the use of his father, to be disposed of by him, share and share alike, as he by deed or will should appoint, among the testator's brothers, H. and J., and the daughter or daughters of his sister E.

SIR EDWARD
SUGDEN,
L.C.
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E. had several daughters.

Held, that the testator's father took a life interest in the property, and that on his decease, without having executed his power of appointment, H. and J., and each of the daughters of E., were entitled to equal shares.

A testator seised under a lease *pur autre vie*, devised the lease upon certain trusts: upon the determination of the lease, the trustee of the will obtained a new lease, which comprised the premises in the original lease, together with additional lands: Held, that the trusts of the will did not attach upon the additional lands.

By indenture, dated the 28th of November, 1789, William P. K. Trench demised to John Cannon the lands of Gortnamacken, containing 42 acres, to hold for two lives. John Cannon erected a flour mill on the lands, and shortly afterwards delivered up the possession of the premises to his son, William Cannon, the testator in the cause. William thenceforward carried on the business of the mill, and built a dwelling-house on the same lands.

By indenture, dated the 21st of September, 1811, being the settlement executed upon the occasion of the marriage of William Cannon, John Cannon, his father, conveyed to him absolutely the said lands and premises.

William Cannon duly made his will, dated the 16th of August, 1812 [as follows:] "I, William Cannon, of Millmount,

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By indenture, dated the 21st of September, 1811, being the settlement executed upon the occasion of the marriage of William Cannon, John Cannon, his father, conveyed to him absolutely the said lands and premises.

William Cannon duly made his will, dated the 16th of August, 1812 [as follows:] "I, William Cannon, of Millmount,

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give, devise, and bequeath all my worldly estate and fortune, of what nature or kind soever, I may die seised, possessed of, or otherwise entitled unto, real, personal, or otherwise, to the Honourable Captain William L. Trench, of Galway, Henry Cannon, of Corker, Samuel Evans, of Mount Evans, Esq., and to their heirs, executors, and administrators, in trust, nevertheless, to and *for the following uses, intents, and purposes, and none other, that is to say, that my said trustees shall and will, as speedily as may be after my decease, lay out in Government or on private securities, but not to be answerable for the same, the sum of 4,500*l.* to be raised out of my personal fortune, which fund stands charged with the payment of a jointure to my beloved wife, under and by virtue of my marriage settlement; and then as to the said 4,500*l.*, and all my estate and interest in the farms of Raheen and Gortnamacken, otherwise Millmount, together with the dwelling-house, out-offices, mill-kilns, and all other edifices thereon, and their appurtenances, in trust for the use of the child, of which my beloved wife is now pregnant, if said child shall happen to be a son; * * but should it so happen that my said son should die before he attains his age of twenty-one years, or die without issue living at the time of his death, then as to the farms and mills of Gortnamacken and Raheen, together with their appurtenances, and also as to the said sum of 4,500*l.*, then in further trust (chargeable however with a jointure for such wife as my said son may take, as aforesaid, which jointure is not to exceed the yearly amount of 100*l.*), to the use of my father during the term of his natural life; and from and immediately after his decease, then in further trust to the use of my brothers, Henry and John Cannon, and the children or child of Samuel Evans, by my sister, Esther Evans, otherwise Cannon, share and share alike, as his last will and testament shall direct and appoint; the same to be distributed among them; * * and should it so happen that the child of which my wife is now pregnant should be a daughter, then my will is, that my said trustees shall, out of the said sum of 4,500*l.*, pay her the sum of 3,000*l.* on her day of marriage, the consent and approbation of my said trustees being thereunto first in writing had; and I hereby direct, and my will is, that should my said daughter marry without their consent, that from the day of such marriage she shall receive no more than the interest of the said sum of 3,000*l.*, her receipt alone to be taken for the same notwithstanding, and the principal sum to go and be

divided amongst her children, or, if but one child, the whole to that one child. And as to the sum of 1,500*l.*, the other part of 4,500*l.*, together with any further property, then in trust to the use of my father, to be disposed of by him, share and share alike, as he by will or deed may appoint, among my brothers Henry and John Cannon, and the daughter or daughters of Samuel Evans, by my sister, Esther Evans, with a like power, with like uses, to my said father, as to the said sum of 3,000*l.* * * As to the rest, residue, and remainder of my worldly *estate and fortune not heretofore and hereby disposed of, in trust to the use of my affectionate father, John Cannon, and his heirs, executors, and administrators for ever ; but if it so happens that my wife should be pregnant of two children, then in trust that the said sum of 4,500*l.* shall be equally divided amongst them, share and share alike, in the same manner, and to the same uses as the said sums of 4,500*l.* and the 3,000*l.* are hereinbefore limited and directed."

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[And he authorised the payment of 1,000*l.* to his wife in discharge of her jointure ; and he appointed the Honourable Captain William Le Poer Trench, of Galway, Henry Cannon, of Corker, Samuel Evans, of Mount Evans, to be his executors. And on the determination of the lease of Millmount, otherwise Gortnamacken, on which he had expended about 3,000*l.*, he requested his executors to get a renewal of the lease for the benefit of his heirs.]

On the same day on which this will bore date, William Cannon departed this life ; Henry Cannon alone proved the will. The child, of whom the testator's wife was *enceinte* at the time of making his will, was born in the following September, and proved to be a daughter, who was named Deborah, and afterwards married Edward Maunsell, and was the testator's only child.

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At the time of the testator's death, he was seised of the said lands of Gortnamacken or Millmount, by virtue of the before mentioned instruments ; he was also possessed of personal property amounting to about 4,500*l.*

On his death, John Cannon [the father] possessed himself of the personal property, and without the dissent of Henry Cannon, the executor, took upon himself to administer the assets ; he also went into possession of the lands and mill of Gortnamacken, in which he continued until 1824, when Henry took possession of them.

John Cannon [the father] paid certain debts of the testator ; he also paid the 1,000*l.* directed by the will to be given to the testator's widow, in lieu of jointure, and the daughter's portion of

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3,000*l.*; and on the marriage of Thomas Fair with Mary Anne, one of the daughters of Samuel Evans, John Cannon advanced to them a sum of 400*l.*, of which the sum of 369*l.* 4*s.* 7½*d.* was taken out of the testator's assets.

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In 1826, Henry Cannon applied to Lord Clancarty, the *head landlord, for a new lease of the lands of Gortnamacken, which was promised, on the terms of certain improvements, which were accordingly made by Henry Cannon, at a considerable expenditure; and by indenture dated the 27th of December, 1826, upon the expiration of the lease of 1789, Lord Clancarty made a lease to Henry Cannon of 152 acres, which included the 42 acres comprised in the former lease, at a rent of 60*l.* 10*s.* 10*d.*

Henry Cannon continued in possession of the lands to the time of his decease, which took place on the 27th of May, 1829; John Fair was his executor. Since the death of Henry Cannon, his widow had been in continued possession of the premises. John Cannon [the father] died on the 26th of April, 1828, having previously made his will; but did not in any manner exercise the power of appointment given to him by his son, the testator. Deborah Evans, another of the daughters of Samuel Evans, married George Acheson, and the present suit was instituted by them for the purpose of carrying into execution the trusts of the said will of William Cannon, and of ascertaining the rights of the devisees and legatees claiming under its provisions.

The usual reference was made to the Master, who by his report found, amongst other matters, the several facts and deeds above stated, and submitted for the decision of the Court the following [among other] points, viz. :

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Secondly, whether under the clause of the will, "And as to the sum of 1,500*l.*, the other part of the 4,500*l.*, together," &c., &c., John Cannon [the father] took any interest in the property therein comprised.

Thirdly, whether the appointees named in the same clause were to take in equal shares, or whether the children of Samuel Evans were to take only one share amongst them.

* * * * *

The Master, by his report, also found that the lease of 27th of December, 1826, was a graft upon that of 1789, so far as regarded the lands comprised in that lease, but not farther, and that the persons interested in the old lease, under the will of William

Cannon, were entitled to the benefit thereof, subject to the claims of the representatives of Henry Cannon, upon account of his expenditure on the premises, which was the consideration given for the lease obtained by him. The Master also reported that the sum of 400*l.*, paid by John Cannon [the father] to Mary Ann Fair, was a gratuity.

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To this report several exceptions were taken: one, that the lease of 1826 should have been reported to have been a graft upon that of 1789, as to all the lands comprised in the later lease; and another exception was grounded on *the proposition, that the sum of 369*l.* 4*s.* 7½*d.*, part of the 400*l.*, should not have been reported a gratuity, but should have been considered as paid in part satisfaction of the claims of Mary Anne Fair, under the will of William Cannon.

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The case now came on to be heard upon the Master's report, and exceptions.

Mr. Serjt. Warren, Mr. Wm. Brooke, and Mr. B. C. Lloyd for the plaintiffs.

Mr. Moore and Mr. J. G. Holmes for the personal representatives of John Cannon the elder.

Mr. Monahan and Mr. Flood, for parties claiming under Henry Cannon.

Mr. P. J. Blake for Mrs. Fair.

Saumarez v. Saumarez (1), *Chave v. Farrant* (2), *Randall v. Russell* (3), *James v. Dean* (4), and other cases were cited.

THE LORD CHANCELLOR [made the following observations upon the two points mentioned in the head-note]:

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Upon the question whether the lease of 1826 was a graft upon the old lease as to the additional lands demised by the new lease, a case, before Sir William Grant, of *Randall v. Russell* (3), was referred to; and in a subsequent case, *Hardman v. Johnson*, in the same volume (5), Sir W. GRANT again decided that the purchase by the lessee of the reversion in fee was for his own benefit. I will not carry this doctrine beyond the limits, to which the authorities

(1) 48 R. R. 116 (4 My. & C. 331).

(4) 8 R. R. 178 (15 Ves. 236).

(2) 11 R. R. 133 (18 Ves. 8).

(5) 17 R. R. 95 (3 Mer. 347).

(3) 17 R. R. 56 (3 Mer. 190).

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have already extended it. If a man, having a fiduciary character in respect of certain lands, obtain a new interest, that will be bound by the old trusts; but in this case I am asked to go much further, and to hold that what he takes besides the old interest, although in new *lands, is bound by the trusts of this will, because the new lands are comprised in the same lease with the old lands. There is no such rule of equity. Is there any equity to follow what a trustee obtains in a property not subject to the trust? If, indeed, trustees mix up property in an improper manner, so that the trust property cannot be distinguished from their own, they may suffer from the consequence of their conduct; but here I must take it for granted that the newly acquired lands can be severed from the others; they may be liable to indemnify the others from the increased rent; but to say that I am bound thus to follow the trustee through all the acts of his life, and that if he took different lands by a different lease from the same party, I am to hold that the old trusts attached upon them would be most unreasonable; I have no disposition to extend the doctrine, which has been carried quite far enough; this exception must, therefore, be overruled, with costs; I shall also overrule the second exception, with costs: no relationship has been made out to bring the case within the authorities upon satisfaction. I shall reserve the first point, and mention it again.

* * * * *

Feb. 13.

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The next question is, whether the father takes any interest in the 1,500*l.*; I think he takes a life interest, for in the first bequest, the testator expressly gives the father a life estate, and in this clause (the words are very singular) he gives the property to the use of the father, "to be disposed of by him, share and share alike, as he by will or deed may appoint, among my brothers," &c.; the gift to the children in default of appointment is only by implication. If a testator give an estate to a man to dispose of to others, and they would only take in default of appointment by implication, and there are words giving the estate to the donee of the power, it is a very fair implication to give him an estate for life; I do not lay down the rule generally, I am not called upon to do so, as a life estate was previously given.

IN THE QUEEN'S BENCH.

CHARLOTTE FOUNTAIN *v.* HENRY MILFORD
BOODLE AND FANNY HIS WIFE (1).

(3 Q. B. 5—14; S. C. 2 G. & D. 455.)

1842.
April 19, 26.

[5]

In an action for an alleged libel, contained in an answer to inquiries respecting the character of a servant, the plaintiff establishes a case to go to the jury, if there is any evidence, as matter of fact, that the answer complained of was untrue to the defendant's knowledge, or, as to matters of opinion, that the defendant, in giving the character, did not really act on the opinion which he professes to have entertained.

Plaintiff having been employed by defendant as governess to her children for upwards of a year, during which defendant twice recommended her to other similar situations, was dismissed in an abrupt manner, without cause assigned, and lost a new engagement in consequence of defendant giving the following answer to an inquiry respecting her qualifications: "I parted with her on account of her incompetency, and not being ladylike nor good-tempered:" to which a postscript was added, "May I trouble you to tell her that this is the third time I have been referred to. I beg to decline any more applications." The plaintiff gave general evidence of her competency, ladylike manners, and good temper. The previous applications referred to in the postscript were on the occasions on which defendant had recommended plaintiff to other situations. No evidence was given for the defendant. The Judge directed the jury that the communication was privileged, unless there was direct evidence that it was influenced by some malicious feeling; but that, if a *prima facie* case of intentional falsehood had been made out, the defendant ought to have shown, and could not, under the circumstances, have had much difficulty in showing, the assertion to have been made under a belief of its truth; and that the question was whether, looking at the whole case, there was sufficient proof that defendant had been influenced by an improper feeling.

Held, that the direction was right, and that there was evidence of malice for the jury.

CASE for libel. The declaration was in the usual form, charging special damage. Plea: Not guilty. Issue thereon. On the trial, before Lord Denman, Ch. J., at the sittings in Middlesex after last Hilary Term, it appeared that the plaintiff, a young person who had been educated for a governess, was engaged by the defendant, Mrs. Boodle, in November, 1839, as daily governess to instruct young children; which employment she retained about fourteen months. During that period, Mrs. Dumergue, sister-in-law of the defendants, being in want of an instructress for her children, Mrs. Boodle recommended the plaintiff to her for that purpose; and, in September, 1840, a Mr. Stewart wanting a person to instruct his wife, a very young lady, in the several branches of a plain English education, Mrs. Boodle recommended the plaintiff to him for that

(1) *Clark v. Molyneux* (1877) 3 Q. B. Div. 237, 47 L. J. C. B. 230.

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purpose. From the 19th to the 23rd of November, 1840, the plaintiff was prevented by illness from *attending at Mrs. Boodle's ; and, on her return to her employment there, a letter was given to her from Mrs. Boodle, dated 19th November, informing her that her services would not be required beyond the 19th of December, but without assigning any reason. At the latter date she ceased accordingly to instruct the defendants' children. In September, 1841, plaintiff was about to be engaged by a Mrs. Norsworthy as instructress for her children ; and that lady applied by letter to Mrs. Boodle respecting the plaintiff's character, in the following terms. "I shall be obliged by your informing me whether you consider her competent to undertake the instruction of little girls from nine to thirteen years of age (with assistance in music only), and if you were perfectly satisfied with her tuition ; also for what reason you declined her attendance ; and whether you consider her a person of good principles and ladylike deportment, of a mild but firm disposition. I will thank you to reply to this question at your earliest convenience ; and for any other observations you may think proper to make I shall feel obliged." To this application Mrs. Boodle replied in the following letter, the alleged libel. "In answer to your enquiries respecting Miss Fountain, I beg to say she had to instruct five of my children from three to nine years old ; it is about a twelvemonth since I employed her, and she taught them as a daily governess for fourteen months, and engaged herself to teach everything but music, which she knew nothing of ; and I parted with her on account of her incompetency and not being ladylike nor good-tempered. When I engaged her she recommended a young friend of hers to teach the music, whom I was much pleased with ; and I discontinued her services when I took another governess." To this was added a postscript : * "May I trouble you to tell her that this is the third time I have been referred to. I beg to decline any more applications." Mrs. Norsworthy, in consequence, broke off her engagement with the plaintiff, which was the special damage complained of. The two applications alluded to in the postscript were those of Mrs. Dumergue and Mr. Stewart. General evidence was given of the plaintiff's competency, good temper, and manners, by witnesses who were her personal friends. There was no direct evidence of the ground of dismissal. The counsel for the defendants contended that the communication was privileged : but the LORD CHIEF JUSTICE refused to nonsuit the plaintiff ; and, no evidence being given for the

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defendants, told the jury that a party in making such a statement is bound to speak the truth, but is not to be challenged to prove the truth of his statement, unless there is direct evidence that the communication was influenced by some malicious feeling; that, if there was here a *prima facie* case of the statement being untrue, the defendants were, under the circumstances, called upon to show it to be what the writer thought to be true: and that the question for them was, whether, looking at the whole case, there was sufficient proof that Mrs. Boodle in writing the letter had been influenced, by some improper feeling towards the plaintiff, to make a false statement knowingly. Verdict for plaintiff: damages 60*l*.

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Kelly now moved for a rule to show cause why there should not be a new trial, on the grounds of misdirection and of the verdict being against the weight of evidence:

There was no evidence for the jury that the statement was malicious.

(LORD DENMAN, Ch. J.: There is no dispute as to the law, which is as laid *down in *Child v. Affleck* (1). But, if the party states an untruth, is not that some evidence of malice?)

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To what extent is the master bound to prove the truth? He may be convinced of his servant's dishonesty, at the same time that he is unable to give evidence of it. Though there may be circumstances making it, in any particular case, a proper question for the jury, whether there was malice, it is generally a question for the Court; otherwise, if on any *prima facie* evidence of untruth the case is to go to the jury, the master has no protection at all. The Court must say that there is proof of malice and of falsehood.

(LORD DENMAN, Ch. J.: Falsehood is evidence of malice.)

There was not the least trace of any unkind act, but the contrary: the conduct which is relied on as evidence of untruth is destructive of the notion of malice.

(LORD DENMAN, Ch. J.: That was put to the jury as evidence negating malice.)

Mrs. Boodle was bound to answer Mrs. Norsworthy's letter as well as she could, or not at all: the latter course would probably

FOUNTAIN have been the more prejudicial to the plaintiff. Her answer was
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(LORD DENMAN, Ch. J.: The reason for the discharge was a matter of fact.)

It was so; but there is no such thing as a privileged communication, if, where the master says he has discharged for incompetency, and there is no direct evidence of the ground, the opinion of the plaintiff's personal friends, in his favour, is sufficient proof of malice or falsehood.

[*9]

(LORD DENMAN, Ch. J.: Suppose the master says in the morning that his servant is perfectly honest, dismisses him in the evening, and says next day that he turned him off for dishonesty, and that he had known it some time. You may convict a party of telling a wilful untruth, from *his own conduct. Here the plaintiff undertook to prove that the statement was false to the defendant's knowledge; and the question related, not to a simple fact like felony, of which there might have been an immediate discovery, but to general competency, which the defendant must have known all the year.)

The evidence consisted of the opinions of personal friends of the plaintiff, and two recommendations by the defendant: if these constitute a case for the jury, no person can give a character which is at variance with any former expression of opinion.

(PATTESON, J.: On these pleadings could the defendants prove the truth?)

They might, to negative malice.

(LORD DENMAN, Ch. J.: If not, the summing up was quite wrong: for the jury were told that there was no doubt that the defendants might rebut the *primâ facie* case by showing the truth (1).)

All the earlier authorities show that, to get rid of the privilege, the plaintiff must show the statement to have been both false and malicious; but, if the law be, as it was laid down to the jury here, that, if the plaintiff proves a *primâ facie* case of untruth, the

(1) See the doubt expressed at N. P. Jones, 32 R. R. 490 (8 B. & C. 578, by Lord TENTERDEN in *Pattison* v. 582).

defendant is called upon to show that the fact was as he represented, any thing is *primâ facie* evidence of malice.

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(LORD DENMAN, Ch. J. : I should have directed the jury that there was no *primâ facie* evidence, had there not been evidence of the defendant's conduct being inconsistent with the opinion given.)

There has been no instance in which the communication has been held not privileged, where the only statement has been in answer to an inquiry about character : there has always been some stepping out of the way. In *Child v. Affleck* (1) *the circumstances were more strongly in favour of the plaintiff than here.

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(PATTESON, J. : In that case there was no proof of falsehood : nothing but the letter itself.)

Proof of falsehood is not essential : it is only a mode of proving malice. The circumstances here are very different from those of other cases in which the question was submitted to the jury : *Pattison v. Jones* (2), *Rogers v. Clifton* (3). In *Weatherston v. Hawkins* (4) it was held distinctly that there must be proof of malice as well as of falsehood : in the present case, and in some others at Nisi Prius, falsehood has been considered evidence of malice.

(PATTESON, J. : Falsehood in fact is no proof of malice, unless the proof involves knowledge of the truth.)

At all events the verdict here is against the weight of evidence.

(LORD DENMAN, Ch. J. (after stating the evidence) : The question put to the jury was, whether Mrs. Boodle had made a false statement knowingly. I followed the judgments of BAYLEY, J. and LITLEDALE, J. in *Child v. Affleck* (1) : BAYLEY, J. said there that in *Rogers v. Clifton* (3) "evidence of the falsehood of the imputations was given, which, independently of the contents of the alleged libel, raised the question whether they had been written *bonâ fide*." LITLEDALE, J. said, "If, indeed, the plaintiff had distinctly proved the falsehood of the statement, the case would have

(1) 33 R. R. 216 (9 B. & C. 403).

(4) Stated 28 R. R. 248 (1 T. R.

(2) 32 R. R. 490 (8 B. & C. 578).

110).

(3) 3 Bos. & P. 587.

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assumed a different shape." We all agree in the view of the law there taken. Mere falsehood is certainly no disproof of *bona fides* : but there were other circumstances in the case ; and the two recommendations cut both ways. They showed an absence of previous ill will ; but they also showed that, when they were given, Mrs. Boodle had found nothing wrong *in the plaintiff. I said that the character was on a matter of opinion ; but that, if Mrs. Boodle had given a character which she did not believe the plaintiff to deserve, that was evidence of malice. I certainly told the jury that, if the plaintiff had made out a *primâ facie* case of falsehood, the defendants could not, under the circumstances, have had much difficulty in showing a foundation for the statement. The length of time during which the plaintiff had remained in the defendants' service might tend to show that the character last given was the result of malice ; and there was also the additional fact, which, as I thought, deserved to be considered, of the ungracious intimation as to two former applications for a character. The main question is, whether there was any evidence of malice.

PATTESON, J. : If there was any evidence for the jury, there can be no doubt that it was rightly left to them. If the plaintiff makes out a *primâ facie* case of malice, it certainly lies on the defendant to answer it : when it is said that he must prove the truth of his statement, it is not meant in the sense of truth absolutely ; but he must show that the assertion was made with an honest belief of its being the truth.)

Cur. adv. vult.

LORD DENMAN, Ch. J., on a subsequent day of the Term (April 26th), delivered judgment as follows :

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The Court has already refused a rule on the ground of misdirection ; and we are desirous, in so important a case, of repeating our reason for doing so. It is because the law was laid down in exact conformity with the existing authorities on the subject. A character *bonâ fide* given to a servant of any description is a privileged communication, and in giving it *bona fides* is *to be presumed. Even though the statement should be untrue in fact, the master will be held justified by the occasion in making that statement, unless it can be shown to have proceeded from a malicious mind. Malice may be established by various proofs : one may be that the statement is false to the knowledge of the party making it.

Up to this point the summing up was not complained of: but another part of it was brought before the Court as objectionable. The misstatement here imputed was, that the defendant had discharged the plaintiff by reason of her faults enumerated in the letter. This could be known to nobody besides the defendant; but she might have shown the probability of that being the real motive, from remonstrances made by her, during the plaintiff's attendance, or complaints, at its being terminated. I told the jury to the effect that, if the plaintiff brought any evidence of wilful untruth, some evidence of the contrary might be reasonably expected, where the nature of the case allowed it. This is a general proposition applicable to every form of action and to evidence of all kinds. The remark is of constant occurrence. "Some proof has been laid before you; you are to consider whether, if unanswered, it is sufficient, and whether the party affected by it might have repelled it, if erroneous, by contrary evidence; now none such is adduced."

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The Court wished for time to consider whether there was, in the present case, any evidence of wilful falsehood in the character given. In support of this imputation, the plaintiff urged that she had served Mrs. Boodle above a year in the capacity of governess, that no complaint was made on any single occasion as to her competency, temper, or manners, and that she had been twice recommended by the defendant during that year to other *persons, to a situation similar to that which she then filled. She charged no particular fact; for that might have come to her knowledge after she had recommended her; and that knowledge might have been confined to herself, so as to preclude her from calling any witness to it. But the statement here was, that she acted on her opinion respecting the plaintiff's capacity and qualities; and of these she possessed the same means of forming an opinion when she introduced her into other families as at any later period.

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The amount of deduction from these means of observation, on account of illness, was submitted to the jury among the circumstances of the case. But the question was not on the justice of the defendant's opinion; it was on the truth of her statement that she acted on that opinion in dismissing her. "I parted with her for her incompetency, bad temper, and unladylike manners." Now she parted with her after a few days' absence, caused by the plaintiff's illness, which perhaps had not been duly notified beforehand; and there was something very harsh in the manner of the dismissal.

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There was a sentence also in the letter containing the character, which requested the lady addressed to desire the plaintiff to make no more applications to the defendant, as she had already answered two. Here the idea was conveyed that she had already, since parting with the plaintiff, spoken of her twice in the same disparaging strain when asked for her opinion of the plaintiff; whereas the only two occasions on which she had given her any character were during the period of her attendance, and on both of these occasions she had commended her, and procured employment for her.

[*14] Here was undoubtedly some evidence of the injurious character being dictated by some indirect motive. Of *course then it must be laid before the jury. But the learned counsel contends that it is so extremely slight, that, though uncontradicted in any particular, the jury ought to have found a verdict against its sufficiency. He observes that the privilege is but illusory, if circumstances so minute can be raised into proof of malice. Much more illusory would it be to hold that there was evidence on which the jury must decide, but that they must decide one way or the verdict cannot stand.

We cannot place ourselves in their stead, and impose our own judgment upon them. They have advantages for attaining the truth which we do not possess, and are the proper tribunal for that purpose. They were bound to decide upon the weight of the evidence laid before them: and we cannot say that they have done wrong in the present instance.

Rule refused.

1842.
April 23.

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REG. v. LADY EMILY PONSONBY AND OTHERS (1).

(3 Q. B. 14—31; S. C. 1 G. & D. 713; 11 L. J. M. C. 65; 6 Jur. 642.)

By permission of the Crown, certain persons occupy apartments in Hampton Court Palace, which was formerly a Royal residence, but in which the Sovereign has ceased to reside. A housekeeper, employed by the Crown, has the superintendence of other apartments, containing pictures (which the public are allowed to see) and lumber. The housekeeper resides, with her family, in the Palace for this purpose, and has also the power of entering the apartments first mentioned. In other respects, the occupiers of these have exclusive possession of them: before the entry of each occupier his apartments are put into ordinary repair by the Crown: but afterwards the occupiers themselves perform such repairs as are considered necessary by the Crown surveyor. They reside there with their families and servants, providing their own furniture, and, in some

(1) Cited in *Att.-Gen. v. Dakin* 157; (1870) L. R. 4 H. L. 338, 359, 39 (1867) L. R. 2 Ex. 290, 296, 36 L. J. Ex. L. J. Ex. 113.—A. C.

instances (but without the sanction or privity of the Crown), have allowed others, on payment of a sum of money, to use the apartments.

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Held that the occupiers by permission of the Crown are rateable to the poor in respect of the apartments so held by them.

On appeal against a rate for the relief of the poor of the parish of Hampton, in Middlesex, on behalf of Lady Emily Ponsonby and others, assessed thereto, the Sessions confirmed the rate, subject to the opinion of this Court on the following case.

Hampton Court Palace, situate in the parish of Hampton, in Middlesex, was built by Cardinal Wolsey in 1514, and was presented by him to King Henry VIII. in 1525; since which period, and up to the present time, it has constituted part of the Royal demesnes appurtenant to the Crown of England.

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After the decease of that monarch, the Palace continued to be a place of occasional residence of the Sovereigns of England until some time in the tenth year of the reign of George II., who was the last Sovereign who personally occupied it: from which time, and up to the present date (embracing a period of upwards of a century), the Palace has ceased to be a place of the actual personal residence of the Crown.

The Palace contains a suite of rooms called the State apartments, all of which contain a collection of pictures, the property of the Crown, to which the public, under certain regulations, are permitted to have access; a room called by the name of the Board of Green Cloth, and a gallery which the public are not permitted to enter, and which are used as a depository for lumber. For the last sixty years the State apartments have not been used for any other purpose; and they are not included in the present assessment.

A guard of honour is always on duty at the Palace; and Divine Service is regularly performed therein by a chaplain appointed and paid by the Crown. The Palace, as well as the gardens which surround it, are maintained and kept in order by the Crown; and the produce of the gardens (which gardens are not assessed) is applied to her Majesty's use. Sentinels are posted at the various entrances: and those entrances are opened and closed at the pleasure of the Crown.

The housekeeper of the Palace (who is the only officer of the Royal establishment resident in the Palace) formerly employed servants to show the pictures, and received a fee or gratuity for such view, as a perquisite of office. Upon the decease of Lady Emily Montague, the late housekeeper, the State apartments were thrown open for the gratuitous admission and view of the public,

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under the superintendence of persons in the dress of police constables, but appointed and paid by the Crown.

There are several other apartments in the Palace, which are in the occupation of private individuals. Some consist of spacious drawing-rooms, dining-rooms, bed-rooms, servants' rooms, kitchen, and other domestic offices, suitable for the residence and accommodation of persons with considerable household establishments; and are now, and always have been, occupied by persons of rank and distinction; and others are occupied by persons of respectable station.

One of the parties included in the rate appealed against is a Mr. Grundry, the husband of the housekeeper of the Palace appointed and paid by the Crown; who, as such housekeeper, and for the proper performance of her duty, resides (with her husband and children) in the part of the Palace set apart for her use, and in respect of which her husband is rated.

With this exception, and that of some other persons similarly situated, the several suites of apartments occupied by private individuals are not enjoyed by them as appurtenant or annexed to any office under the Crown, but are occupied by virtue of a written grant or warrant, made by the Lord Chamberlain of her Majesty's household, in the following form.

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"These are to require you to deliver, or cause to be delivered, unto ———, the keys and possession of the following lodgings in his Majesty's Palace of Hampton Court: viz." (here follows a list of the apartments, together with a description of their situation in the Palace.) "which lodgings are to be inhabited by ———, or some part of ——— family, a part of every year, or they will be considered vacant, and disposed of accordingly: and, when the family are absent from Hampton Court, it is expected that one of their servants should be left in the lodgings, or that the keys thereof be left with you, or the housekeeper for the time being. And for so doing this shall be your warrant. Given under my hand and seal, this ——— day of ——— 18 —, in the ——— year of his Majesty's reign.

"To ———, Housekeeper of his Majesty's Palace of Hampton Court.

" ——— Lord Chamberlain." L.S.

In some cases the names of two or more individuals (members of the same family) have been included in one warrant.

The occupiers of these suites of apartments provide at their own expense every kind of household furniture and fixtures requisite for the furnishing and fitting up of such apartments. Previously to occupiers taking possession of the apartments, such repairs as may be considered by the officers of the Crown as necessary to be done to such apartments are done at the expense of the Crown: but, in some instances, where the repairs desired for the accommodation of such occupiers have been of such a nature as to require a considerable outlay, such repairs have been effected at the joint expense of the Crown and occupier. But all alterations or additional *works required by the occupiers are done at their own expense; and in some instances such additional works and alterations have amounted to 1,000*l.* and upwards. Afterwards the occupiers themselves are bound, at their own expense, to do whatever internal works, alterations, and repairs, may be found necessary for keeping up and preserving the apartments in a proper and tenantable condition, or which they may consider essential to their greater convenience and enjoyment: but no works, alterations, and repairs, are done except under the direction of the officers of her Majesty's Office of Woods and Forests; and the Government contracting tradesmen are employed and paid by the occupiers of the apartments. A periodical survey is made of the apartments every second year by the officers of the Crown; and a report made of the repairs necessary for placing them respectively in tenantable repair: and notices are given by the Crown to the occupiers to have such repairs done, which are done by them accordingly. (The case then set out the form of a notice of an intended inspection, signed by three Commissioners of the Woods and Forests; and also a notice from one of the Commissioners, stating what repairs are required, and requesting that directions may be given for performing them (1).)

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(1) The forms were as follows. "Office of Woods, &c. 20th March, 1841. In pursuance of the Queen's commands signified to the Chief Commissioner of her Majesty's Woods, &c., an inspection of the several apartments at Hampton Court Palace had by grace and favour of her Majesty will take place in the ensuing summer, and in the summer of every ensuing second year, of which due notice will be given to each of the several occupiers, who,

after such survey and inspection, will be required to execute whatever internal works and repairs may be found necessary for keeping up and preserving the apartments in a proper and tenantable condition.

"(Signed) DUNCANNON,
"A. MILNE,
"CHARLES GORE."

"Her Majesty's Office of Woods" &c. "September, 1841. Referring to

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The number of families now occupying such suites of *apartments in the Palace may be taken to amount to from sixty to seventy ; and the number of servants in their employment may be computed on an average at between one hundred and fifty and two hundred.

Instances exist in which the holders of warrants for such apartments derive considerable pecuniary emoluments to themselves by accommodating other persons with the use of the same, in consideration of sums of money paid in gross, and also by way of yearly rent: and instances have occurred where others have derived emolument by taking in inmates or lodgers to board and lodge, or only to lodge, with them in such apartments: and others by carrying on or exercising their several trades or professions therein. But none of these acts have been done with the sanction or privity of the Crown.

Many apartments occupied by private individuals communicate with the State apartments; and the doors of communication are kept locked during such occupation. *But, if, in the general care of the Palace, the housekeeper finds it necessary to open those doors, she exercises the power of doing so, and of passing through the apartments which are so occupied. Some of the apartments have exclusive outward entrances, opening upon the public high road and barge walk.

In the sixth year of the reign of William and Mary, the parishioners of Hampton, finding themselves peculiarly aggrieved by the increased charges on the parish funds, arising from the relief of poor persons who followed the Court, and by workmen then engaged in the alterations making at the Palace, petitioned the Crown for redress: when their Majesties were pleased to grant to them an annual pension of 50*l.*, payable out of the receipts of Exchequer, by writ of privy seal. (The case then set out a copy of the writ (1).)

the notice of the 20th of March last, addressed to you by this Board, I beg to inform you that a survey has been made of the present state of the interior of the apartments you occupy by the grace and favour of the Sovereign in Hampton Court Palace, and the repairs, &c. (according to the statement on the other side) are reported as necessary for placing your apartments in tenantable repair.

"I am, on behalf of the Commissioners of her Majesty's Woods" &c.,

"to request that you will, at your earliest convenience, give directions for executing the works enumerated, which must be done under the direction of the officers of this Board. I am, your most obedient servant,

"(Signed) A. MILNE."

"The apartments require a general repair, painting, whitewashing," &c. (or as the case may be, varying according to circumstances),

(1) It was as follows. "(Copy). October, 1694. Anno Regis et Regine

This pension has from time to time varied in its amount, by reason of the land tax and other taxes attaching on it. For some years immediately following the time of the grant, it was received by the under housekeeper of the Palace, and distributed by him at his discretion. It has, for many years last past, been received by the churchwardens, and applied by them in aid of the funds created and established by, and with the other charitable donations given generally by, the donors to the use of the poor of the said parish of Hampton.

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If the Court should be of opinion that the appellants were rateable in respect of their several occupations of the premises, then the said rate, and the order of Sessions confirming the same, were to stand confirmed; but if the Court should be of a contrary opinion the rate and order of Sessions were to be quashed.

Erle, Kelly, and Adolphus, in support of the order of Sessions:

The appellants have a beneficial occupation. *Primâ facie* that is so, because they dwell in the apartments. And the house is not occupied by the Crown. The exemption of the Sovereign from rateability is a personal privilege, which does not protect the house while in the beneficial occupation of others. [They cited *Rex v. Terrott* (1), *Rex v. Hurdis* (2), *Lord Bute v. Grindall* (3), *Ayr v. Smallpeace* (4), *Rex v. The Chelsea Water Works Company* (5), *Rex v. Munday* (6), *Rex v. Green* (7), *Governors of the Bristol Poor v. Wait* (8), and *Rex v. The Mayor, &c. of York* (9).]

Gulielmi et Mariæ Sexto. Poor of the town of Hampton. Pension. — A warrant unto the Exchequer to pay out of monies (not appropriated to particular uses by Act of Parliament to the churchwardens of the parish of Hampton, for the time being, a pension of 30*l.* yearly during their Majesties' pleasure, for the support of the poor of that town, at four quarterly payments, to commence from Michaelmas last, and to be distributed by the said churchwardens as the vicar of the said parish and the under housekeeper of their Majesties' Royal Court of Hampton Palace shall direct. Subscribed by Sir John Nicholas, by warrant under his Majesty's Royal sign manual, countersigned by the

Lords Commissioners of the Treasury. Dated" &c.

(1) 7 R. R. 502 (3 East, 506).

(2) 1 R. R. 765 (3 T. R. 497).

(3) 1 R. R. 220 (1 T. R. 338). Affirmed on error, in the Exchequer Chamber, *The Earl of Bute v. Grindall*, 2 H. Bl. 265.

(4) 1 Bott's P. L. 125, pl. 154, 6th ed. See *Rex v. St. Luke's Hospital*, 2 Burr. 1053, 1060.

(5) 39 R. R. 438 (5 B. & Ad. 156).

(6) 1 East, 584.

(7) 32 R. R. 639 (9 B. & C. 203).

(8) 44 R. R. 370 (5 Ad. & El. 1).

(9) 25 R. R. 423, n. (6 Ad. & El. 419).

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Sir F. Pollock, Attorney-General, and Hodges, contra :

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The general law, as laid down on the other side, is not disputed : the question is almost entirely one of fact. *There is here neither tenancy nor occupation by the appellants : the sole occupier is the Crown. All that the appellants have is a permission, by the occupier, to retain possession of the apartments, and that not, either in right or fact, exclusively. They are no more rateable than a visitor in a gentleman's house. [They referred to *Lord Bute v. Grindall* (1), *Rex v. The Chelsea Water Works Company* (2), *Rex v. The Aire and Calder Navigation Company* (3), *Winter v. Miles* (4), *Elderton's case* (5), *Crogate's case* (6), and *Rex v. St. Mary the Less* (7).]

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LORD DENMAN, Ch. J. :

The Sessions have found that the appellants are rateable as occupiers : and I agree that the question is very much one of fact, although referred to us by the Sessions. We may consider, either that the Sessions, having found the fact, ask us whether there be any evidence which can support such a finding, or that they have referred the case altogether to us, that we may decide instead of themselves. Taking either view, I think the Sessions have done right in confirming this rate. There is clearly sufficient evidence that the separate apartments are in the occupation of the persons rated : and I think that, if I were on a jury, I should find that fact affirmatively ; and, on this evidence, ought to be directed so to find. It is clear that this was at one time a Royal Palace, and equally clear that it has ceased to be so. The case of *Lord Bute v. Grindall* (1) was stronger than this : for there the Crown did, in fact, occupy to a certain extent : yet Lord Bute was held rateable for the profit which he derived : whereas here the Crown, for a long course of years, has had no possession. There are, indeed, pictures in the house which are exhibited to the public : but it cannot, I think, be said that this circumstance, or the placing of sentinels about the premises, shows an occupation by the Crown. The Crown, therefore, does not occupy, unless by the housekeeper's having the keys. But, when we look at the other circumstances

(1) 1 R. R. 220 (1 T. R. 338).
Affirmed on error, in the Exchequer
Chamber, *The Earl of Bute v. Grindall*,
2 H. Bl. 263 (1 R. R. 220, n.).

(2) 39 R. R. 438 (5 B. & Ad. 156).

(3) 33 R. R. 344 (9 B. & C. 820).

(4) 10 R. R. 391 (10 East, 578).

(5) 3 Salk. 284 ; S. C. 2 Ld. Ray.
978 ; 6 Mod. 73.

(6) 8 Co. Rep. 66 b.

(7) 16 R. R. 811 (4 T. B. 477).

of the case, we find this to be merely a condition or restriction, qualifying the privilege granted to the occupants. There is a sort of grant to hold at will, which is not inconsistent with a beneficial or a burthensome occupation. *These considerations appear to me to dispose of the facts which make most strongly against the rate. Then we have, on the other side, a multitude of circumstances combining to show the liability of the occupiers. There was, however, one argument urged by the *Attorney-General* which appears to require an answer. He put the supposition that a subject was placed in the position of the Crown here; and he asked whether such subject would not be rateable for these premises: and *Mr. Hodges* further illustrated that, by supposing the case of an owner of premises who had gone abroad, permitting, during his absence from this country, a friend to occupy under the superintendence of the domestics of the house; and he asked whether such an owner would not be rateable. These questions we must answer in the negative. In each case the person who was allowed to occupy would be the party rateable. In the case supposed by *Mr. Hodges*, the party who was permitted to occupy would be tenant at will; and he, not the absent owner, would be rateable. Two or three cases have come very near to this: the nearest, perhaps, is *Rex v. St. Mary the Less* (1). But there I think the owner himself did occupy, though loosely: and the case indeed could not supply an argument against this rate, unless it was decided that the other party was not rateable. Probably that other party was poor, and it was not thought worth while to raise the question. Here it does not appear to me that any real doubt exists that the parties rated do occupy beneficially and exclusively.

REG. °
PONSOMBY.

* [*27]

PATTESON, J. :

I felt no doubt in this case till I heard the *Attorney-General's* argument as to the rateability of *a subject placed in the position in which the Crown is here. But stat. 43 Eliz. c. 2, s. 1, though it uses the words "by taxation" "of every occupier of lands, houses," &c., does not confine the taxation in respect of a house to the case where the party occupies the whole house. In *Ayr v. Smallpeace* (2) the comptroller of Chelsea College, residing in apartments forming a part only of the hospital, was held rateable in respect of his occupation of the apartments. In *Rex v. St. Mary*

[*28]

(1) 16 R. R. 811 (4 T. R. 477).

(2) 1 Bott's P. L. 125, pl. 154, 6th ed.

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the Less (1) the appeal was on the ground that the appellant, the owner of the house, was overrated; but it was not contended that he could not be rated at all: there may therefore clearly be different parties rated for different parts of a house. During the argument I turned to *Rex v. Williams* (2), where it was settled that, if A. have apartments in the King's Palace of Whitehall, and one break into them and steal A.'s goods, the indictment should charge a breaking of the King's mansion house and stealing the goods of A. But then the King actually resided at Whitehall; so that the whole house was, in fact, occupied by him. It was also held in *Rex v. Peyton* (3) that the Invalid Office at Chelsea could not be laid to be the dwelling house of the prosecutor, who occupied all the upper part of the building, the ground floor being used for the business of the office; and the King certainly did not reside in the office, though the Government paid the rent and taxes of the whole house. But that case does not show that different parties may not be rated for separate parts of a house: *that, as far as I know, has never been disputed. The question therefore is, whether the parties here rated have exclusive occupation of the respective apartments. It is found that they do occupy: that a warrant issues to authorise them to do so: that the keys are delivered to them: that they are bound to reside for some part of the year, in default of which they are to be considered to have quitted: and that they must, when about to be absent, leave a servant in the apartments, or deliver the keys to the housekeeper. It is quite clear that this is an assignment of the apartments to the persons named in the warrant. The housekeeper has the key of the State apartments, and also can go into those of the appellants; and that raised some little doubt whether there was not still an occupation by the Crown. I think, however, that this is merely a condition annexed to the grant. It is clear to me that the several appellants have exclusive occupation: and then all the cases concur to show their liability. *Lord Bute v. Grindall* (4) was a stronger case than this, the Crown being there, if the expression may be used, a joint occupier with the Ranger; the Ranger found the corn seed, but the King the seed for the rye grass and clover; and the ground was worked by the King's servants and horses, the Ranger's servants, however,

(1) 16 R. R. 811 (4 T. R. 477).

(2) Or *Hungate's case* (14 Car. I.); 1 Hal. Pl. Cr. 522.

(3) 1 Leach's Cr. C. 324 (4th ed.).

(4) 1 R. R. 220 (1 T. R. 338).

Affirmed on error, in the Exchequer Chamber, *The Earl of Bute v. Grindall*, 2 H. Bl. 265 (1 R. R. 220, n.).

partly working the arable land: the King took the greater part of the produce of the grasses; the Ranger took the corn. And the Ranger was held rateable in respect of his taking the corn.

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WILLIAMS, J.:

I am of the same opinion. No doubt could have been raised in this case except from the *peculiar nature of the occupation. For that there has been a beneficial occupation cannot be doubted. Even had the user of those apartments been exercised in a public capacity (which is not pretended), *Rex v. Terrott* (1), a case never questioned, shows that the parties would have been rateable if they derived any benefit. I feel no difficulty on the question of interest. Suppose—and that is granting a great deal—that this be called a case of permissive occupation; still it must be remembered that in 1833 this Court had under its consideration the case of *Rex v. The Chelsea Water Works Company* (2), where it was argued that the Company did not occupy the reservoir, since they had no more than a permission to use it: but DENMAN, Ch. J. (3) said, that “a tenant at will is, until the will be determined, an occupier of the land.” Therefore, if this were merely a permissive occupation (and I think it is more), the appellants occupied rateable property within the meaning of stat. 43 Eliz. c. 2, s. 1. The only doubt is, whether this should still be considered a Royal Palace; for, if it should, that would supply an objection to the rate. But the facts point the other way. The only servant left in the occupation of the Palace has indeed the right of entering into the apartments. But I agree with my Lord and with my brother PATTESON that this is merely a qualification of the occupation. And *Lord Bute v. Grindall* (4) resembles the present case as to this point, or indeed is stronger: for there the Crown was an occupier jointly with the Ranger. I *think counsel acted properly here in giving up the rate on the housekeeper’s husband. Still, in *Rex v. Field* (5), which is recognised and explained by Lord ELLENBOROUGH in *Rex v. Terrott* (6), the party rated could not have brought in her family, which here the housekeeper may do and does.

[*30]

[*31]

(1) 7 R. R. 502 (3 East, 506).

(2) 39 R. R. 438 (5 B. & Ad. 156).

(3) 39 R. R. 448 (5 B. & Ad. 169).

(4) 1 R. R. 220 (1 T. R. 338).

Chamber, *The Earl of Bute v. Grindall*,

2 H. Bl. 265 (1 R. R. 220, n.).

(5) 5 T. R. 587.

(6) 7 R. R. 502 (3 East, 511, 514).*

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WIGHTMAN, J. :

I was engaged as counsel in this case, and am indeed interested in the result, to a certain extent. I therefore do not propose to take part in the decision.

Rate to be amended by striking out the name of the husband of the housekeeper.

1842.
 April 26.

GIBSON v. IRESON AND LYONS.

(3 Q. B. 39—47.)

[39]

Materials in the house of a manufacturer, for the purpose of his trade, are not distrainable by his landlord for rent. And, where, in trover for silk, the defendant justified taking it on the premises of C. as a distress for rent due from C., and the plaintiff replied that, before and at the time &c., he carried on the business of a silk manufacturer, and C. carried on the business of a silk weaver on the said premises, and that plaintiff, shortly before &c., "did, in the way of his said trade and business, employ the said C. in the way of his said business and calling as his workman, for certain wages in that behalf, to weave and manufacture into velvet" on the said premises "certain silk of the plaintiff," which silk (the subject of the action), being on the premises for that purpose, was wrongfully distrained :

Held, on general demurrer, that the silk was sufficiently shown to have been on C.'s premises for the purpose of C.'s trade, and therefore exempt from distress : and that the words "as his workman, for certain wages," taken with the context, did not imply that C. had the silk only as the plaintiff's servant, and for the purposes of plaintiff's trade.

Quære, whether it be necessary to the exemption of goods held for the purposes of trade, that the trade be "public ;" and, if so, what constitutes a "public trade?"

TROVER for a piece of velvet.

Plea, that one Joseph Cooper held a room, parcel of a certain house, situate &c., as tenant thereof to defendant Ireson, under and by virtue of a demise &c., at a rent &c., the reversion belonging to Ireson ; that on &c., *6*l.* of the said rent was in arrear ; whereupon Ireson in his own right, and Lyons as his agent and by his command, at the time when &c., seized, took and distrained the said velvet &c., then being in the said demised room, for a distress for the said rent, and then removed and impounded &c. : which is the supposed grievance &c. Verification.

[*40]

Replication. That plaintiff, before and at the said time when &c., was a silk manufacturer, and the trade and business of a silk manufacturer then carried on ; and that the said Joseph Cooper, before and at the said time when &c., was a silk weaver, and the

business and calling of a silk weaver then carried on in the said room, of which premises the defendants then had notice: and that, shortly before the said time when &c., plaintiff, while so carrying on the said trade and business, did, in the way of his said trade and business, employ the said Joseph Cooper in the way of his said business and calling as his workman, for certain wages in that behalf, to weave and manufacture into velvet, in the said room of the said Cooper, being the room in the said plea mentioned, certain silk of the plaintiff; and for that purpose plaintiff, before the said time when &c., had delivered to Cooper the said silk, in order that Cooper might, in his said room, manufacture the said silk into velvet as aforesaid for plaintiff, to be afterwards sold and disposed of by him in the way of his said trade and business, and that Cooper might, when and as soon as the said silk should be so woven and manufactured as aforesaid, return to plaintiff the said velvet: that Cooper, before the time when &c., received from plaintiff the said silk for the purpose hereinbefore mentioned in that behalf; and that, just before and at the said time when *&c., in pursuance of the said bailment to him, the said silk had been and was woven and manufactured by the said Cooper into velvet as aforesaid, and the said velvet, being the said velvet in the said declaration and in the said last plea mentioned, then was in the room of the said Cooper for the purpose aforesaid, and was, before and at the said time &c., about to be returned and delivered to plaintiff in the way of his trade and business aforesaid, and for the furtherance, advancement and maintenance of trade and commerce: and that a reasonable time for Cooper to weave and manufacture the said silk into velvet as aforesaid, and to return the same so soon as the same was woven and manufactured into velvet as aforesaid, had not elapsed before the said time when &c.: wherefore defendants of their own wrong seized &c. Verification.

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[*41]

General demurrer, and joinder.

Peacock for the defendants:

The velvet was not protected from distress under the circumstances replied. Five heads of exemption are enumerated in *Simpson v. Hartopp* (1): the goods in question, if protected at all, come under the second head, of "things delivered to a person exercising a public trade to be carried wrought worked up or

(1) Willes, 512, 514 (stated in *Gorton v. Falkner*, 2 R. R. 466).

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managed in the way of his trade or employ" (1). The ground of this protection is explained by PARKE, B. in *Muspratt v. Gregory* (2). * * Now, on the statement in this replication, it does not appear that the goods were in Cooper's room for the purpose of a public trade, but that Cooper had them as the plaintiff's workman and servant, to make them up for Cooper's individual use: and a person employed by one master to manufacture goods is not within the second exemption in *Simpson v. Hartopp* (3).

(PATTESON, J. mentioned *Wood v. Clarke* (4).)

[*43]

The subject of the action there was a loom furnished to the *weaver by his employer, to be used in manufacturing materials for him, which were sent at the same time: and the decision applies to the loom only.

(PATTESON, J.: No one disputed that the materials were exempt; and Lord LYNDEHURST said that the question was whether the "employer's privilege" "is confined to the materials which he supplies, or extends also to the machinery by which the working up is effected.")

The replication here states that the plaintiff had employed Cooper "as his workman, for certain wages." The word "wages" points out conclusively the relation of master and servant, and was held to do so by Lord ELLENBOROUGH in *Rex v. Heywood* (5), where stat. 13 Geo. I. c. 23, s. 5, was held inapplicable to a dispute between a mill-owner and clothiers for whom he had worked.

(PATTESON, J. cited *Hardy v. Ryle* (6).)

The relation between these parties, as shown by the replication, is the same which is contemplated by stat. 17 Geo. III. c. 56, s. 8, where the employer is called the "master." The principle of exemption from distress established by the early decisions, and

(1) The same words (with very trifling exceptions) are used by the Court of Common Pleas in *Gisbourn v. Hurst*, 1 Salk. 249.

(2) 46 R. R. 455 (1 M. & W. 633, 652, 653; S. C. Tyr. & Gr. 1086). Affirmed on error, in Exch. Ch., 46 R. R. 460 (3 M. & W. 677).

(3) Willes, 514. (See the full citation of this case by BULLER, J. in *Gorton v. Fulkner*, 2 R. R. 466.)

(4) 35 R. R. 758 (1 Cr. & J. 484; S. C. 1 Tyr. 314).

(5) 1 M. & S. 624.

(6) 9 B. & C. 603.

relied upon here, is not to be extended: *Joule v. Jackson* (1), per Lord ABINGER, C. B. and PARKE, B.

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(LORD DENMAN, Ch. J. mentioned *Gorton v. Falkner* (2).)

The point now taken was not fully considered in that case.

(LORD DENMAN, Ch. J. : Unless there is some peculiar meaning in the words "public trade," this case comes within the second exemption in *Simpson v. Hartopp* (3), as reported in Willes. It is differently stated by BULLER, J. in *Gorton v. Falkner* (4) ("things delivered to persons exercising their trade, as cloth in a tailor's shop") : but *Willes's reports had not then been published.)

[*44]

It is no answer to the present objection that the goods were sent to Cooper for the carrying on of the plaintiff's trade. The privilege in question, though spoken of by Lord LYNDBURST in *Wood v. Clarke* (5) as the "employer's" privilege, is not his, but that of the trader whom he employs : it is evidently so treated by the Court of Exchequer in *Joule v. Jackson* (1) ; and PARKE, B. says there (6), "The benefit of trade of the person sending the article is immaterial : it is the benefit of the trade of the person to whom it is sent, which is to be considered." "I believe *Gisbourn v. Hurst* (7) will be found to be the only case where goods are said to be privileged on the ground of benefit to the trade of the person sending them."

R. V. Richards, *contrà*, was stopped by the Court.

PATTESON, J. (8) :

The only foundation for the argument in support of this demurrer is, that Cooper appears by the pleadings to have been a servant and not a person carrying on a trade. But I find no such thing in the replication. I do not know what is meant by the phrase "public trade." It is said, in *Simpson v. Hartopp* (9), that "materials sent to a weaver, or cloth to a tailor to be made up, are privileged for the sake of trade and commerce : " but the trade of a tailor is not public, any more than that of a silk weaver. If he were obliged,

(1) 56 R. R. 757 (7 M. & W. 450).

(6) Pp. 452, 453.

(2) 2 R. R. 463 (4 T. R. 565).

(7) 1 Salk. 249. See *Read v. Burley*,

(3) Willes, 514.

Cro. Eliz. 596, there cited.

(4) 2 R. R. 466 (4 T. R. 568; as *Simpson v. Harcourt*).

(8) Lord Denman, Ch. J. had left the Court.

(5) 35 R. R. 758 (1 Cr. & J. 496; 1 Tyr. 326).

(9) Willes, 515 (stated 2 R. R. 466).

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[*45]

*as a carrier is, to receive whatever is sent to him, the case might be different: but he is under no such obligation. The present case, however, is not rested upon the nature of the trade; for it is argued that Cooper did not receive the goods as a person carrying on trade, but as a servant. The replication states that the plaintiff employed Cooper "as his workman, for certain wages:" but we must look at the context; that distinctly states that Cooper carried on the business and calling of a silk weaver; and it is then alleged that the plaintiff, carrying on the trade of a silk manufacturer, "did, in the way of his said trade and business, employ the said Joseph Cooper in the way of his said business and calling as his workman, for certain wages in that behalf, to weave and manufacture into velvet" "certain silk." Although, therefore, the plaintiff employed Cooper as his workman for wages, it was in his calling of a silk weaver, and as the plaintiff's workman on that occasion. The goods were delivered to him to be "worked up" "in the way of his trade," according to the express words of *Simpson v. Hartopp* (1). It was not in terms decided, in *Wood v. Clarke* (2), that materials furnished by the manufacturer to the weaver were privileged, as well as the loom so furnished; but it was assumed in argument at the Bar; and the proposition is adopted by the Court, Lord LYNDBURST, C. B., saying: "It appears to me that it" (the privilege) "is confined to the materials, and does not include the machinery." The action there was not brought for the materials; and therefore the question as to them was not essential to the decision; but the intimation of opinion is a strong one. *In this case there is no doubt; and the plaintiff is entitled to judgment.

[*46]

WILLIAMS, J. :

Brown v. Sherill (3) is one of the last cases on this subject. The plaintiff in that case sent a bullock to the premises of a butcher to be slaughtered; and the carcass, while there, was held exempt from a distress for rent. I am not prepared to say what we must necessarily understand as to the publicity of the trade in that case. In a certain sense the trade would be public if many cattle were slaughtered, if few, not: but to make the publicity depend upon the quantity of trade would introduce a very uncertain criterion. Here, however, the whole argument is that the goods were not sent to the party distrained upon in the course of his own trade, but

(1) Willes, 514.

S. C. 1 Tyr. 314).

(2) 35 R. R. 758 (1 Cr. & J. 484;

(3) 41 R. R. 401 (2 Ad. & El. 138).

that the plaintiff was the trader, and sent them as to a servant. It is true that the replication has the words "did" "employ the said Joseph Cooper" "as his workman, for certain wages;" but the earlier part shows that Cooper was a silk weaver, and explains the manner in which he was employed. I think therefore that the case is not distinguishable from *Brown v. Shevill* (1), and is within the principle of other decisions in favour of exemption.

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WIGHTMAN, J. :

The replication here does not materially differ, as to the point now before us, from the plea in bar in *Wood v. Clarke* (2). It is suggested that the *dictum* there, as to the materials, was extrajudicial; but Lord LYNDEHURST, C. B. quotes Co. Litt. 47 a, where, among things exempt from distress, "the *materials in the weaver's shop for making of cloth," and "cloth or garments in a tailor's shop," are mentioned. And *Mr. Peacock* scarcely contends that the decisions exempting materials in such cases are not correct, but denies that the materials were on Cooper's premises for the purpose of a public trade carried on by him; suggesting that Cooper was a mere servant. But, if this be correctly put, I scarcely know how a tailor is protected in the case stated in the book. And there is nothing in the facts pleaded here which obliges us to consider Cooper in the light of a servant, properly so called: for it is expressly said that he was a silk weaver, and employed in the way of that business by the plaintiff, a silk manufacturer. Stress is laid upon the words "as *his* workman," which follow: but Cooper was the plaintiff's workman, in the language of pleading, while employed on his work. So the tailor, at the time when he is making up the clothes, is the workman of his employer. I cannot distinguish this from other cases of the same kind in which goods have been held protected.

[*47]

Judgment for plaintiff.

(1) 41 R. R. 401 (2 Ad. & El. 138).

(2) 35 R. R. 758 (1 Cr. & J. 484;
S. C. 1 Tyr. 314).

1842.
May 3.

STANLEY v. HAYES (1).

(3 Q. B. 105—108; S. C. 11 L. J. Q. B. 176; 2 G. & D. 411.)

[105]

Covenant by lessor with lessee for quiet enjoyment without let &c., by the lessor or any other person lawfully claiming or to claim by, from or under him.

Entry on lessee, and seizure of goods on the premises by collector of land tax, for arrears due from lessor before the demise :

Held no breach.

[*106]

COVENANT. The declaration stated that the defendant, by indenture, "did demise and lease" to plaintiff four messuages for the term of twenty-one years, at the yearly rent of 60*l.*, and did covenant, &c., to plaintiff that he, paying the rent, and keeping all the covenants &c. on his part, "should and lawfully might peaceably and quietly have, hold, use, occupy, possess and enjoy" the demised premises for and during the term, "without any let, suit, trouble, denial, disturbance, eviction or interruption whatsoever, of or by the defendant, his heirs or assigns, or any other person or persons lawfully claiming or to claim by, from or under him, them, or any of them." Averments, that plaintiff entered &c., and kept the covenants on his part. Breach; that defendant did not suffer or permit plaintiff, for or during the term, peaceably or quietly to have, hold, &c., or enjoy, without the let, suit, &c., according to the covenant, but, on the contrary, that, after the making of the *indenture, and during the continuance of the demise, and while plaintiff was possessed &c., to wit on &c., "one John Pittman, then being the collector of land tax, lawfully entered into and upon the said messuages and premises, and then seized and took certain goods and chattels, then being in and upon the said messuages and premises, as a distress for a certain sum of money, to wit the sum of 3*l.* 7*s.* 8*d.*, before and at the time of the making of the said indenture, and of the commencement of the said demise, due and owing from the defendant for and in respect of certain arrears of land tax, before the making of the said indenture, and before the commencement of the said demise, rated, assessed and charged upon the said messuages and premises." By means whereof plaintiff was injured, &c. in the occupation and possession of the premises, contrary to the covenant &c., and certain lodgers, to wit &c., left him.

General demurrer, and joinder. The point stated in the margin of the demurrer was, that the entry of the collector upon the demised premises was not a breach of the covenant for quiet enjoyment.

(1) Approved, *Kelly v. Rogers* [1892] 1 Q. B. 910, 912, 61 L. J. Q. B. 604, 66 L. T. 582, C. A.

Peacock, for the defendant :

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It is true that the word "demise" contains an implied covenant for quiet enjoyment : but that general covenant is restrained by the particular one which follows, that the lessee shall enjoy without let &c., "of or by the defendant," "or any other person or persons lawfully claiming or to claim by, from or under him : " *Nokes's* case (1), *Gainsford v. Griffith* (2), *Line v. Stephenson* (3). The distress for land tax was not an interruption by any person *claiming under the defendant ; the claim was against him.

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(LORD DENMAN, Ch. J. : Is there any covenant against defaults of the lessor ?)

There is none. The covenant against incumbrances, of which a form is given in *Platt on Covenants*, 330, Part 3, c. 11, s. 4, would, perhaps, have been most applicable. No express authorities have been found on the point : but, on principle, the plaintiff cannot be entitled. It is as if the distress had been for ground rent. The plaintiff might have paid the sum claimed, and sued the defendant for money had and received.

(LORD DENMAN, Ch. J. : I think we have held that that could not be done (4).)

Byles, contra :

It does not appear that there are any direct authorities on the point. The express covenant certainly restrains the general covenant ; but the words of the express covenant are very large. By sect. 17 of the Land Tax Act, stat. 38 Geo. III. c. 5 (5), the arrear in question was a charge upon the demised premises. The tax, being due from the defendant, was an incumbrance ; the levy was an interruption of the quiet enjoyment, and a breach of the covenant. In *Morris v. Edgington* (6), the interruption, by a lessor, of a right of way claimable under the lease was held to be ground of action on a covenant for quiet enjoyment : so was a distress for rent due from a third party, in *Dawson v. Dyer* (7). So, if the landlord had granted a rent-charge, and the grantee had distrained,

(1) 4 Co. Rep. 80 b ; *S. C.* (as *Nokes* 532.
v. *James*) Cro. Eliz. 674.

(2) 1 Saund. 51, 60.

(3) 44 R. R. 819 (4 Bing. N. C. 678).

(4) See *Baber v. Harris*, 9 Ad. & El.

(5) Repealed in part by S. L. R. Act, 1898 (61 & 62 Vict. c. 22), s. 1 and Sch.—A. C.

(6) 12 R. R. 579 (3 Taunt. 24).

(7) 39 R. R. 566 (5 B. & Ad. 584).

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that would have been a breach of the covenant. Again, if he had suffered judgment, and the lands had been taken under an *elegit*, or if he had forfeited them by treason or felony, it would have been a breach. And it appears from **Broking v. Cham* (1), cited in *Hayes v. Bickerstaff* (2), that an extent by process out of the Exchequer for a debt due from the landlord to the Crown would also be a breach of his undertaking for quiet enjoyment.

(PATTESON, J.: The undertaking in *Broking v. Cham* (1) was general.)

In the cases of forfeiture and debt to the Crown it could no more be said that the disturbing party claimed by or under the landlord than here.

Peacock, in reply :

In *Dawson v. Dyer* (3) it was alleged in the declaration, and not denied, that the party distraining lawfully claimed from and under the defendant. A distress may be an interruption of the quiet enjoyment, without being a disturbance provided against by the covenant: as if it were under a rent-charge claimed by a title paramount to that of the lessor. The claim of land tax here was paramount to any right of the defendant. The plaintiff might have paid it and sued him for money had and received. An *elegit* would have been a demand, not under, but against the landlord, and therefore not a disturbance within the covenant.

LORD DENMAN, Ch. J. :

This distress was certainly not a proceeding within the terms of the covenant. We cannot extend the remedy provided by the indenture. Let, suit, disturbance or interruption by the defendant, or others claiming by, from, or under him, are different things from the injury here complained of, those words implying a claim by title from the lessor. Here the claim was against him.

PATTESON, WILLIAMS, and WIGHTMAN, JJ. concurred.

Judgment for defendant.

(1) Cro. Jac. 425.

(2) Vaugh. 118, 121.

(3) 39 R. R. 566 (5 B. & Ad. 584).

THE SALTERS' COMPANY, LONDON, v. JAY (1).

(3 Q. B. 109—117; S. C. 11 L. J. Q. B. 173; 2 G. & D. 414; 6 Jur. 803.)

1842.
May 3.
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The Prescription Act, 1832 (2 & 3 Will. IV. c. 71), s. 3, enacting that, when the access of light to a dwelling house &c. shall have been enjoyed therewith for twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, extends to the custom of the city of London authorizing one neighbour to obstruct the access of light to another's messuage &c., by building on an ancient foundation: therefore, in an action for building so as to darken windows which had been enjoyed without interruption for twenty years, the custom of London is no longer a defence.

CASE. The declaration stated that, before and at the time &c., a certain messuage and warehouse with the appurtenances, situated in the city of London, were in the possession and occupation of T. A. and E. S. as tenants thereof to the plaintiffs, they being reversioners; in which said messuage &c. there then of right were and still ought to be divers, to wit two, windows, through which the light and air during all the time aforesaid ought to enter &c. for the convenient and wholesome use &c. Yet defendants, well knowing &c., but intending &c., while T. A. and E. S. were tenants, and plaintiffs reversioners, as aforesaid, wrongfully built and erected a wall and buildings near the said windows respectively, and kept and continued the said wall &c., to wit from &c. until &c. By means whereof the light and air were and are prevented from entering &c., and the messuage and warehouse have been rendered and are dark &c., and plaintiffs have been and are injured in their reversionary estate &c.

Plea. That in the city of London, from time whereof &c., there hath been and still is a certain ancient and laudable custom there used and approved of, that is to say, "that, if any person or persons or body corporate hath or have a messuage or house in the said city, near, adjacent, or contiguous and adjoining to another ancient messuage or house, or the ancient foundations of another *ancient messuage or house, in the said city, of another person or persons, his or their neighbour or neighbours there, and the windows or lights of such messuage or house as first aforesaid are looking, fronting or situate towards, upon or over or against the said other ancient messuage or house or ancient foundations of another ancient messuage or house of such other person or persons," &c., "so being near, adjacent, contiguous or adjoining, although such messuage or

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(1) Cited in *Dent v. Auction Mart Co.* (1866) L. R. 2 Eq. 238, 249, 35 L. J. Ch. 355.—A. C.

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house as first aforesaid, and the lights and windows thereof, be and were ancient, yet such other person or persons, his or their neighbour or neighbours, being the owner or owners of such other ancient messuage or house or ancient foundations, so being near, adjacent or adjoining, by and according to the custom of the said city, in the same city for all the time aforesaid used and approved, well and lawfully may, might and hath and have used, at his and their will and pleasure, his or their said other messuage or house, so being near, adjacent or adjoining, by building to exalt or erect, or of new upon the ancient foundations of such other messuage or house so being near, adjacent or adjoining, to build and erect a new messuage or house, to such height as the said owner or owners shall please, against and opposite to the said lights and windows near or contiguous to such other messuage or house, and by means thereof to obscure and darken such windows or lights, unless there be or hath been some writing, instrument or record of an agreement or restriction to the contrary thereof in that behalf." That, before the said time when &c., to wit on &c., W. H. Cotton, S. Cotton, E. Cotton, T. Cotton and G. V. Cotton were seised of a certain ancient messuage and house, and the foundations of a certain

[*111] *messuage and house, in the city of London, near, adjacent, contiguous and adjoining to the messuage and warehouse with the appurtenances in the said declaration mentioned: and, being so seised, the said W. H. Cotton, S. Cotton, E. Cotton, T. Cotton and G. V. Cotton demised their said messuage, house and foundations to Thomas Reynolds and Edward Parkins, *habendum* to the said T. Reynolds and E. Parkins, their executors, administrators and assigns, for a certain term of years still unexpired; by virtue of which demise the said T. Reynolds and E. Parkins afterwards, to wit on &c., entered into and upon the premises so demised to them, and became and were possessed thereof for the said term: and that, the said T. Reynolds and E. Parkins being desirous of exalting and erecting their said messuage and house, and of new upon the said ancient foundations to build and erect a new messuage and house against and opposite to the windows in the declaration mentioned, and their being and having been no writing, instrument or record of an agreement or restriction to the contrary thereof in that behalf, defendant, at the said time when &c., as the servant of the said T. Reynolds and E. Parkins, and by their command, exalted and erected the said messuage and house of the said T. Reynolds and E. Parkins, and of new upon the said ancient

foundations built and erected a new messuage and house, against and opposite to the said windows in the said declaration mentioned, and thereby a little obscured and darkened such windows: which are the same grievances &c. Verification.

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Replication. That the said access and use of light and air to and for the said messuage and warehouse in the declaration mentioned, through the windows therein *mentioned, to and for the purposes therein also mentioned, which same access and use of light and air was so obstructed and injured by the committing of the said grievances as in the declaration complained of and in the said plea attempted to be justified, had been and was actually enjoyed with the said messuage and warehouse, as of right and without interruption, by the respective occupiers of the said messuage and warehouse, for and during the full period of twenty years next before the commencement of this suit; and that the said access and use of light and air was not during the said twenty years, or any part thereof, enjoyed as aforesaid by or by reason of any consent or agreement expressly made or given for that purpose by deed in writing. Verification.

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General demurrer (1): and joinder.

Sir W. W. Follett, Solicitor-General, for the defendant:

Stat. 2 & 3 Will. IV. c. 71, s. 3, does not destroy the ancient custom of the city of London. Sect. 2 enacts that no claim, by custom, prescription or grant, to the easements there mentioned, when they shall have been actually enjoyed by any person claiming right thereto without interruption for twenty years, shall be defeated or destroyed by showing only that such easement was first enjoyed at any prior time; but such claim may be defeated in any other way by which the same is now liable to be defeated. This regulates the proof by which rights may be established or impeached, but does *not alter the rights themselves. Sect. 3 enacts "that when the access and use of light to and for any dwelling house," &c. "shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed

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(1) The points stated by the defendant were, that the custom of London, of building on an ancient foundation, is not affected by stat. 2 & 3 Will. IV. c. 71; that the replication neither traverses nor confesses and avoids the plea, and that it introduces matter irrelevant to the defence.

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by some consent or agreement expressly made or given for that purpose by deed or writing." The words "any local usage or custom to the contrary notwithstanding" are meant to save the right which a party having so enjoyed may possess, but cannot abolish the right which any other person may have had by usage or custom to enjoy land of his. If there has been for twenty years such an access and use of light as that clause points out, the tenant proving that will establish his easement *prima facie*, without further evidence: but his neighbour who has obstructed the light by building may prove, in answer, that he built upon an ancient foundation. If sect. 3 had been meant to deprive parties of their rights or legal defences, it would have been differently worded; that this was not designed, appears from sect. 1, which recites that the expression "time immemorial" is now by law deemed to include the whole period of time from the reign of Richard I., "whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice," and, "for remedy thereof," proceeds to enact &c.

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(LORD DENMAN, Ch. J.: If there were a local custom that nothing less than thirty years' enjoyment should establish the easement, you agree that this clause would prevent *the custom from being set up?)

It would: but the party claiming by twenty years' enjoyment cannot sue another who claims to interrupt that enjoyment by an independent custom.

Kelly, contra:

The Court cannot adopt the defendant's construction without striking out words from the statute. It is urged that the preamble restrains the enactment of sect. 3: but, although the preamble of an Act may assist in construing ambiguous expressions, it cannot control clear ones. It is observed in 2 Darris on Statutes, 655, c. 11, that, "In doubtful cases, recourse may be had to the preamble, to discover the inducements the Legislature had to the making of the statute; but where the terms of the enacting clause are clear and positive, the preamble cannot be resorted to:" and reference is made to the words of Lord ELLENBOROUGH and LAWRENCE, J. in *Rex v. Marks* (1), where the latter learned Judge

says: "It is nothing unusual in Acts of Parliament for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law." The intention of the Legislature in this statute appears clearly by comparison of sect. 2 with sect. 3. In the former clause, where the right to certain easements is rendered absolute after forty years' enjoyment, the words are merely "the right thereto shall be deemed absolute and indefeasible;" but in sect. 3 the expression, with regard to the access of light after twenty years' enjoyment is, "the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the *contrary notwithstanding." Those words must have been introduced for some purpose. The custom of London as to building on ancient foundations, and a similar one which existed at York (1), must have been known to the Legislature: and it cannot be presumed that the words in question were used without reference to them. The intention was to make the law uniform in this respect, and to take away a custom which has often been deemed unjust, and is not beneficial to the citizens generally, because if, in any instance, it benefits one citizen, it does so by injuring another, perhaps in the same degree. No existing custom is pointed out on the defendant's side, to which the words may allude. It is argued that the statute was not meant to take away the defence which any party had by the law as it stood; but the Act itself does not bear out that assumption. Sect. 2 expressly takes away defences. The object of the Act was to end uncertainties by making rights, under particular circumstances, indefeasible, except in such cases as the Act specifically pointed out (2).

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Sir W. W. Follett, in reply:

The preamble of a statute may be important where the following enactment is not direct, but capable of two senses. The customs of London are confirmed by statute (2 W. & M. sess. 1, c. 8, s. 3): it might be expected that direct words would have been used to destroy what had been so sanctioned.

(1) See *Bland v. Moseley*, cited in *William Aldred's case*, 9 Co. Rep. 67 b, 58 a, b.

(2) *Kelly* also objected to the plea, as not showing that the defendant's house was "exalted and erected" entirely upon the ancient foundations;

and he referred to *Privilegia Londini*, 54, &c. (ed. 1702), and *Hughes v. Keme*, Yelv. 215, and *William Aldred's case*, 9 Co. Rep. 57 b, there cited. See 20 Vin. Ab. 9 tit. Stopping Lights (C.), pl. 1, in marg. This point was not noticed in the judgment of the Court.

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LORD DENMAN, Ch. J. :

I think there is no ambiguity in sect. 3, and that the preamble cannot be brought in to prevent its operation. (His Lordship then read sect. 3.) We cannot suppose that, when these words were used, the customs in question were not contemplated : and no local usage or custom is pointed out, besides those of the city of London, to which the words might apply. It requires great ingenuity to suggest any different application.

PATTESON, J. :

There is no ambiguity. The words of sect. 3 are very plain. It says that, under the circumstances pointed out, the right " shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding." The custom of London would have rendered it defeasible. The enactment makes it no longer so after twenty years. The clause excluding the operation of any local custom is introduced only in that section which relates to the access of light. This points the enactment as far as could be done, without express words, to the custom of London.

WILLIAMS, J. :

I am of the same opinion. Sect. 3 is not sense unless read with a reference to the custom of London : for, if that remained in force, the right, in London, though declared absolute and indefeasible by the statute, would be defeasible at any moment.

WIGHTMAN, J. :

[*117] I think the clause as to local customs is directly pointed at that of the city of London : and, if a party there does not choose to avail himself of *the custom within twenty years, he may very well submit to the operation of this clause.

Judgment for the plaintiff (1).

(1) See *Wyntanley v. Lee*, 2 Swanst. 333.

HARRISON *v.* ELVIN AND ANOTHER.

(3 Q. B. 117—119; S. C. 11 L. J. Q. B. 197; 2 G. & D. 769; 6 Jur. 849.)

1842.
May 4.

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A will, made after the Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), came into operation, was attested by one witness in his own handwriting; and he also held and guided the hand of a second witness, who could not write or read; and in this way the second witness's name was written as attesting witness. The testator had desired the two to attest.

Held a sufficient attestation under sect. 9.

TRESPASS for breaking and entering a house, and taking goods there, &c. Plea, Not guilty, by statute (11 Geo. II. c. 19, s. 21).

On the trial, before Tindal, Ch. J., at the last Norfolk Assizes, the defendants claimed a right of entry, to distrain for rent on behalf of parties who had purchased the reversion from the devisees named in the will of the plaintiff's father, under whom the plaintiff held as tenant: and the only question, so far as regards the present decision, was whether the will was sufficiently attested under stat. 7 Will. IV. & 1 Vict. c. 26, s. 9, it being dated after that Act came into operation. The will had the names of two parties, Crofts and Galor, subscribed as witnesses. Crofts had written his own name; but Galor, who was called as a witness, said that Crofts had held his, Galor's, hand, "and wriggled it about on the paper;" and that the attestation which now appeared was what was then so written. Galor could not write or read. It appeared that the two attested at the request of the testator, and that, in all respects except the attestation, the will was properly executed. A verdict was found for the defendants, leave being reserved to enter a verdict for the plaintiff if the Court should be of opinion that the will was not well executed.

B. Andrews, on a former day in this Term (1), moved accordingly:

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This will is not attested by Galor: the writing cannot be said to be his.

(LORD DENMAN, Ch. J.: Is there any doubt that, if a man were paralytic, and got some one to hold his hand while he wrote, that would still be his handwriting?)

It has been formerly doubted whether an attestation by a marksman were sufficient (2): but here there is not even Galor's mark. The

(1) April 21st. Before Lord Denman, Ch. J., Patteson, Williams and Wightman, JJ.

(2) See *Harrison v. Harrison*, 8 Ves. 185; *Addy v. Griz*, 8 Ves. 504.

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characters are not his: and he does not know their meaning. Suppose the question had arisen after the deaths of Crofts and Galor; the handwriting of the subscribing witnesses must have been proved: but how could such proof be given as to Galor's writing? The difficulty might not arise in the case of an attestation by a marksman: for there is generally added to the mark a written declaration by another person to the effect that the marksman made the mark; and proof might perhaps be given of the writing of such other person.

(WIGHTMAN, J.: Galor meant that his name should be written.)

But he never knew whether it was written or not.

(PATTESON, J.: If this were at the foot of a promissory note, would it not bind Galor by estoppel?)

That would be because Galor could not dispute his own act.

(LORD DENMAN, Ch. J.: Then you call such a signature his own act.)

He is a party to the act: but he does not subscribe, which is what the statute requires in the case of attestation of a will.

(LORD DENMAN, Ch. J.: Could not the devisor have signed in this way?)

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The statute (sect. 9) says that the will shall be "signed" "by the testator, or by some other person in his presence and *by his direction:" this signature might therefore be sufficient as to the testator: but, as to the witnesses, the statute allows no such alternative. The express allowance of the alternative in one case, and the absence of such allowance in the other, raises a strong inference that the Legislature meant to require the actual signature of each witness.

LORD DENMAN, Ch. J. :

We will confer with the Lord Chief Justice.

Cur. adv. vult.

LORD DENMAN, Ch. J., now delivered judgment as follows :

The question in this case was, whether the will had been properly attested, one of the subscribing witnesses not knowing how to write, and his hand being guided by another person. It was suggested,

as a difficulty, that the signature of a witness unable to write for himself could not be proved, if brought in question after his death. But this is only a kind of inconvenience which is inseparable from all modes of attestation. We must take the signature here to be that of Galor. There will therefore be no rule.

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Rule refused.

MILWARD AND OTHERS v. HIBBERT AND ANOTHER (1).

(3 Q. B. 120—142; S. C. 11 L. J. Q. B. 137; 2 G. & D. 142; 6 Jur. 706.)

1842.
Jan. 21.
April 28.

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In an action by the owner of a steam vessel against the underwriter upon a policy on the vessel for time, the declaration stated that certain pigs were thrown overboard for the safety of the ship, and that plaintiff was afterwards forced to contribute to the general average. Plea, that the pigs were laden on deck, by reason whereof defendants were not liable to contribute to the average. Held bad (on demurrer to the replication) for not showing that the lading was improper under the circumstances.

Semble, that, a plea of a custom of trade in London may be supported by proof of a custom prevailing in London and other English ports.

Semble, that, where a record states a custom that the jettison of goods stowed on deck shall not bind the ship-owner to contribution for general average, or a custom that it shall not entitle him, in case of his so contributing, to recover the amount from the underwriter on the ship, the pleading is bad, for not limiting the custom to cases where the party discharged is ignorant of the mode of stowage.

Where issue is joined on the question whether a party had notice that goods would be stowed according to an alleged custom, proof of the usage of trade, though strong evidence of knowledge, is not sufficient to induce the Court to assume the fact of notice, contrary to a finding of the jury negating such notice.

DEBT. The first count stated that heretofore, to wit 20th November, 1837, by a deed poll or policy of assurance, then made and sealed &c.; the declaration then set out the policy, which recited that plaintiffs had represented to defendants, Directors of, and acting for, the Indemnity and Mutual Marine Assurance Company, that they were interested in, or authorized as owners or agents to make, the assurance, and had covenanted, &c., to pay the premium mentioned: and it was witnessed that, in consideration &c., defendants covenanted and agreed with plaintiffs that the capital stock and funds of the Company should be subject and liable, and be applied, to pay and make good all such losses and damages therein-after expressed as might happen to the subject-matter of the said policy, and might attach to the said policy, in respect of the sum of

(1) Distinguished in *Wright v. Mur-wind* (1881) 7 Q. B. D. 62, 68, 50 L. J. Q. B. 643; *Royal Exchange Shipping Co. v. Dixon* (1886) 12 App. Ca. 11, 18, 56 L. J. Q. B. 266.—A. C.

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3,600*l.*, thereby assured. Which assurance was thereby declared to be upon hull and stores, valued at 10,000*l.*, machinery valued at 10,000*l.*, in all 20,000*l.*, average payable at such valuation, of the ship or vessel called the *Kilkenny* steamer, whereof &c. was then master, lost or not lost, “at and from the 28th day of November, 1837, at *noon, in port and at sea, at all times, on all occasions and services, until the 28th day of November, in the year of our Lord 1838 at noon, with liberty to tow and be towed ; to return 9*s.* per cent. per month while laid up ; at 10*s.* per cent. for every uncommenced month, when cancelled : and defendants did covenant and agree that the assurance aforesaid should commence upon the said ship, at and from or as aforesaid, until she had moored at anchor four-and-twenty hours in good safety, at as aforesaid ; and that it should be lawful for the said ship or vessel to proceed and sail to, and touch and stay at, any ports or places whatsoever, in the course of her said voyage, for all necessary purposes, without prejudice to that assurance. And, touching the adventures and perils which the capital stock and funds of the said Company were made liable unto, or were intended to be made liable unto, by this insurance, they were of the seas, men of war,” &c. (in the usual form), “and for all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the aforesaid subject-matter of the said assurance.” There were the usual exceptions as to corn, fish, &c., and clauses providing that sugar, tobacco, &c., should be warranted free from average under five per cent., and all other goods and the ship and freight free from average under three per cent., unless general, or the ship should be stranded. Averment, that the plaintiffs were interested in the hull, stores and machinery of the ship, to the amount of all the money insured : that the ship, after the making of the policy, and during the continuance of the risk, and while plaintiffs were so interested in the hull, stores and machinery, to wit 18th February, 1838,

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“departed and set sail on a *certain voyage from Waterford to London ; and that, after the commencement of the said voyage, and during the continuance thereof and of the said risk in the said policy of assurance mentioned, and whilst the said plaintiffs were so interested in the said hull, stores and machinery of the said ship or vessel in the said policy of assurance mentioned, divers wares, goods and merchandise, to wit 1,000 pigs, of great value, to wit of the value of 2,000*l.*, were shipped and loaded at Waterford aforesaid, in and on board the said ship or vessel in the said policy

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of assurance mentioned, to be carried and conveyed on freight, on board the said vessel, from Waterford aforesaid to London aforesaid: " "that the said ship, whilst she was proceeding on her said voyage with the said pigs on board, and during the continuance of the said risk, and whilst the plaintiffs were so interested as last aforesaid, to wit on the day and year last aforesaid, by the perils and dangers of the seas, and by stormy and tempestuous weather, and the violence of the wind and waves, became and was leaky, and greatly strained, damaged, broken and distressed; insomuch that, by means thereof, it then and there became expedient and necessary, for the preservation of the said vessel and cargo, and for the benefit of all concerned in the said vessel and cargo, to lighten the said vessel, and to cast and throw part of her cargo overboard: " "that, for the preservation of the said ship and cargo, and for the benefit of all concerned and interested in the said ship and cargo, and in order to lighten the said vessel, the master of the said vessel did then and there cast and throw overboard the said pigs, so being of great value, to wit " &c., "and leave them in the sea; whereby they were lost: by reason whereof the plaintiffs, in respect *of their interest in the hull and stores and machinery of the said ship, then became liable to bear, and did actually pay, a proportionable part of the value of the said pigs so lost as aforesaid, and thereby sustained a general average loss, to wit an average loss of 1,000*l.*, upon the hull and stores and machinery of the said vessel so assured and valued as aforesaid: and, in consequence thereof, the said defendants became liable to pay to the said plaintiffs a certain sum of money, to wit the sum of 450*l.*, being the said defendants' proportion of the said average loss for and in respect of the said sum of 3,600*l.* by them assured as aforesaid. Of all which said premises" &c. (notice to defendants). "By reason whereof an action" &c.

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There was a second count for money paid: and a third on an account stated.

Pleas. 1. To the first count, that the master did not cast and throw overboard the said pigs, in manner and form, &c.: conclusion to the country. Issue thereon.

2. To the first count. That the said pigs, therein alleged to have been cast and thrown overboard, before and up to the time of their having been so cast and thrown overboard had been, and were, laden and placed in and upon the deck of the said vessel; by reason whereof the defendants were not, nor are, liable to pay

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or contribute to any average loss sustained by the said jettison of the said pigs : verification. Replication. “ That, at the said time when the said pigs were laden and placed in and upon the deck of the said vessel of the plaintiffs as in the said second plea alleged, the said vessel of the plaintiffs was proceeding on and prosecuting a certain voyage from Waterford to London : ” “ that, before and at the time of such loading and placing of *the said pigs in and upon the deck of the said vessel of the plaintiffs, there had been, and was, and still is, a certain known and approved usage and custom of trade touching and concerning the loading of pigs in and on board of vessels trading between Waterford and London, and employed in carrying pigs from Waterford to London aforesaid, that is to say, that the owners of such vessels have had, and have been used and accustomed to have, and of right ought to have had, and still of right ought to have, for themselves and their servants, the liberty and privilege of loading and placing in and upon the deck of such vessels a reasonable number of such pigs as they from time to time respectively are employed to bring from Waterford to London : ” “ that the said pigs, in the first count of the declaration and in the second plea above mentioned, were, before and up to and at the time of their being so cast and thrown overboard as aforesaid, laden and placed in and upon the deck of the said vessel of the plaintiffs, in pursuance of and according to the said custom and usage of trade ; and the same were a reasonable number in that behalf : ” verification. Demurrer, assigning for causes that it is not stated in the replication that the said defendants had any notice of the said custom therein stated and set forth, or that the said defendants had any notice that the said vessel would be employed in carrying pigs as in that replication mentioned. Joinder in demurrer.

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3. To the first count. That the said Company, before and at the time of the making the policy, were a Company of persons united in copartnership, carrying on the business of granting or subscribing policies of marine insurance at London ; that the said policy was made at London ; and that, before and at the time of *the making it, “ there had been and was at London a known and approved usage and custom of trade, touching and concerning goods and chattels stowed or placed on the deck of a ship or vessel, that is to say, that, if any goods or chattels so stowed or placed in or upon the deck of any ship or vessel should have been necessarily cast or thrown overboard for the preservation of the said last mentioned ship or

vessel, then the owner of the said last mentioned goods or chattels so cast or thrown overboard should not have or receive any payment, contribution or allowance, as or by way of general average, for or in respect of the said jettison ; " and that the said pigs, alleged to have been cast and thrown overboard, before and up to the time of their being so cast and thrown overboard had been, and were, laden and placed in and upon the deck : verification. Replication. That " there was not, nor is there, any such usage and custom of trade at London, touching and concerning goods or chattels stowed or placed on the deck of a ship or vessel, in manner and form as the defendants " &c. : conclusion to the country. Issue thereon.

4. To the first count. Commencement as in the third plea ; but stating a custom of trade at London, in the case of goods and chattels so stowed &c., to be, that " if any goods or chattels stowed or placed in or upon the deck of any ship or vessel should have been necessarily cast or thrown overboard for the preservation of the said last mentioned ship or vessel, then any person or persons, having granted or subscribed any policy or policies of insurance upon the said last mentioned ship or vessel, or upon the stores thereof, or upon any matter or thing belonging to the same or concerning or relating thereto, should not pay, or be bound or liable to pay, *to the assured any loss by way of general average, for and in respect of the said jettison : " averment that the pigs, &c. (as in the third plea) : verification. Replication, traversing the custom, as in the replication to the third plea : conclusion to the country. Issue thereon.

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5. To the first count, that the said pigs, " before and up to the time of their having been so cast and thrown overboard, had been and were laden and placed in and upon the deck of the said vessel in the said first count mentioned ; and by reason thereof the management of the said last mentioned vessel had been and was obstructed, and the risk and peril of the said last mentioned vessel, and also of the said last mentioned pigs, had been and was greatly increased : " and that, at the time of the making of the policy, defendants " had not any notice or knowledge that the said last mentioned vessel would be engaged or employed during the said risk in the said last mentioned policy mentioned in the carriage or conveyance of any goods or chattels which would be loaded or placed on the deck of the said last mentioned vessel : " verification. Replication. That, though true it is that the pigs " were laden and placed in and upon the deck of the said vessel as in the said fifth

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plea alleged, nevertheless" "the management of the said vessel was not obstructed, nor was the risk and peril of the said vessel, or of the said pigs, increased by reason thereof, in manner and form as the defendants" &c.: and "that, before and at the time of the making of the said policy, the defendants had due notice that the said vessel would be engaged and employed, during the continuance of the said risk in the said policy mentioned, in the carriage and conveyance of goods and chattels which would be loaded or placed on the deck of the said vessel:" conclusion to the country. Issue thereon.

[127] 6. To the second and third counts, *Nunquam indebitatus*; conclusion to the country. Issue thereon.

The demurrer to the replication to the second plea was argued in last Michaelmas Term (1).

Cresswell, for the defendants:

This is an action by the owner of the ship, not of the cargo, against the insurer in respect of payments made by the owner for general average. The owner of a deck cargo could not recover against the owners of the remaining cargo the value of goods thrown overboard, because the principle of general average, which is that there shall be equal contribution where the risk is equal, could not apply. The cargo stowed on deck is not only placed in a more dangerous situation than the other cargo, but it also increases the danger to the other cargo, and ship, by impeding the management of the ship. The subject is discussed in Serjeant Shee's edition (6th) of Abbott on Shipping, p. 428 (Part IV. c. 9, s. 4) (2). It is there shown from the Consolato del Mare, the French Ordinance, and Valin's Commentary on the latter, that a deck cargo is to be excluded from the benefit of general average. The same doctrine is affirmed in the twenty-ninth section of the Ordinances of Königsberg (3), c. 8, the eighth section of the Ordinances of Hamburg (4), tit. 22, and the twenty-ninth section of the Ordinance of Bilbao (5), "of ordinary averages." Then the liability of the insurer on goods does not arise where they have been stowed on deck. This appears from *Da Costa v. Edmunds* (6), where Lord

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(1) November 9th, 1841. Before Lord Denman, Ch. J., Williams, Coleridge and Wightman, JJ.

(2) See 14th ed. 785.

(3) 2 Magens, Ins. 206.

(4) 2 Mag. Ins. 240.

(5) 2 Mag. Ins. 402. See *ib.* p. 96, Ordinances of Rotterdam, sect. 91. The French Ordinance of 1681 is also given in the same volume, p. 157, &c. See p. 182.

(6) 16 R. R. 763 (4 Camp. 142).

ELLENBOROUGH told the jury that, if there were no usage to carry goods on deck, the underwriters were not liable to make good the loss. The same principle must apply to making good the loss on a general average. The replication indeed here alleges a custom so to carry the pigs : but that will not make these underwriters liable unless they had notice (1). The underwriter of a ship upon a time policy cannot be bound to take notice of the custom in every possible voyage, whatever might be the case if the insurance were for the particular voyage. In *Todd v. Reid* (2) it was decided that a custom for the underwriter to set off the balance due to him from the broker of the assured, in settling the loss, was illegal : afterwards it was held, in *Bartlett v. Pentland* (3) and *Scott v. Irving* (4), in the case of a custom similar to that set up in *Todd v. Reid* (2), that the custom could not affect parties who had not notice. In *Gould v. Oliver* (5) an action was brought against the shipowner, for contribution to general average, by the owner of goods stowed on deck, the declaration alleging a custom in the particular voyage to stow a reasonable quantity on deck, and that the quantity stowed was reasonable ; the plea alleged that there was no custom for contribution in such case : which plea was held bad on demurrer. But there the Court appeared to think the case distinguishable from that of the underwriter on the goods ; and it would be so, *à fortiori*, from that of the underwriter *on the ship. The principle of the decision in *Gould v. Oliver* (6) seems to have been that there was an understanding, or a kind of implied contract, between the shipowner and the owner of the goods. But that ground fails in the case of an insurer upon the ship for time.

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Sir W. W. Follett, Solicitor-General, *contra* :

The plea is bad, or is answered by the replication. An insurer is bound to take notice of all the customary perils of the adventure ; *Pelly v. The Royal Exchange Assurance Company* (7), *Noble v. Kennorray* (8), *Vallance v. Dewar* (9), *Ougier v. Jennings* (10), *Kingston v. Knibbs* (11). The notice in question must therefore be assumed upon

(1) 16 R. R. 763. (See *Da Costa v. Edmunds*, in banc, 2 Chitt. Rep. 227.) The insurance there was on the voyage from London to Lisbon, as appears by the *Nisi Prius* report, 4 Camp. 142.

(2) 4 B. & Ald. 210.

(3) 34 R. R. 560 (10 B. & C. 760).

(4) 35 R. R. 396 (1 B. & Ad. 605).

(5) 44 R. R. 674 (4 Bing. N. O.

134). See also *Gould v. Oliver*, 58 R. R. 622 (2 Man. & G. 208).

(6) 44 R. R. 674 (4 Bing. N. C. 134).

(7) 1 Burr. 341.

(8) 2 Doug. 510.

(9) 1 Camp. 503.

(10) 10 R. R. 739, n. (note (a) to 1 Camp. 505).

(11) 10 R. R. 742, n. (1 Camp. 508, n.).

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this replication. An express averment is not necessary; for no evidence of the fact need be given. The party who insures a ship for time undertakes the risk upon all voyages: his contract is the same as it would be if all the voyages which can be performed in the time were expressly mentioned in the policy. The owner of the pigs has already recovered against the present plaintiffs, in an action of assumpsit for general average, after argument in banc in the Court of Exchequer in Ireland (1). There can be no distinction between the liabilities of the insurer on the ship and the shipowner: whatever legitimately increases the risk of one increases that of the other. Thus, if, by the usage of a particular port (2), ships are compelled to take in their cargoes on the outside of the harbour, that will probably increase the shipowner's risk; but *it cannot be contended that the insurer on the ship is not liable for this risk. The principle of contribution to general average is, not that all the goods are exposed to the same risk (which very often is not the fact), but that all are equally benefited. Thus, if the mast be cut away to save the ship, all contribut^é, though the peril to the mast is probably greater than the peril to the goods. The passage cited from Abbott on Shipping proves only that, *primâ facie*, the stowage of goods on deck is improper, as obstructing the management of the vessel; for which reason (which is the only one given in the editions published in Lord Tenterden's life (3)) there is, in the common case of sailing vessels, no contribution in respect of such goods, unless there be either an usage, or consent. But in the case of a steam vessel the stowage on deck is the stowage most convenient for the navigation. At all events, it cannot be taken as an universal rule that stowage on deck in every case obstructs the navigation. The plea therefore is bad for not showing that here the navigation was obstructed. In *Da Costa v. Edmunds* (4) it was held that the policy was not avoided by stowage on deck, because the particular article was commonly stowed there. *Gould v. Oliver* (5), where the question arose between the shipowner and the owner of the goods thrown overboard, confirms this decision.

Cresswell, in reply. * * *

Cur. adv. vult.

(1) *Harley v. Milward*, 1 Jones & Carey, Exch. Rep. (Ireland) 224.

(2) 10 R. R. 742, n. (See *Kingston v. Knibbs*, 10 R. R. 742, n. (1 Camp. 508, n.).

(3) See ed. 5, p. 355.

(4) 16 R. R. 763 (4 Camp. 142).

(5) 44 R. R. 674 (4 Bing. N. C. 134). See *Gould v. Oliver*, 58 R. R. 622 (2 Man. & G. 208).

LORD DENMAN, Ch. J., in last Term (January 21st, 1842), delivered the judgment of the Court :

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After stating the substance of the declaration and second plea, his Lordship proceeded as follows :

A replication was pleaded and demurred to : but the plaintiff excepted to the plea ; and we must see whether it makes out a good defence in law. The plea assumes that in no case whatever can the shipowner recover from the underwriter the value of goods loaded on deck. The authority cited for this doctrine is a passage at p. 428 of Serjeant Shée's recent edition (1) of Lord Tenterden's treatise on Shipping. " The Consolato del Mare, and the French Ordinance, exclude from the benefit of general average, goods stowed upon the deck of the ship, and Valin, in his Commentary upon the *latter (2), gives two reasons for the exception." He adds, " in the first place they ought not to be there, and can only be, because the vessel is full without them, or because the master has neglected to stow them elsewhere, in either of which cases, he and his owners are responsible to the shipper, unless the goods were placed there with his consent. Secondly, because there is every reason to presume, that being in the way, they will be thrown overboard, before the necessity for jettison has occurred, on account of the obstruction they create. But he tells us that this does not apply to boats or other small vessels going from port to port, or to trades in which that mode of stowage is sanctioned by custom. The same rule prevails in this country and in America ; the exceptions to it were recognised by Lord ELLENBOROUGH in a case between the owner of goods and the underwriter, and more recently, the reasoning of Valin has been adopted by the Court of Common Pleas (3), in an action against the owner of a ship, to recover contribution to a loss by jettison of goods stowed on deck." The corresponding paragraph in the text of the fifth edition of Lord Tenterden's treatise on Shipping, p. 355 (the last published during his life) runs thus. " The French Ordinance in express terms excludes from the benefit of general average goods stowed upon the deck of the ship : and the same rule prevails in practice in this country. Goods so stowed may in many cases obstruct the management of the vessel, and except in cases where usage

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(1) Sixth edition.

(2) The Commentary on liv. 3, tit. 8, s. 13, contains the passages referred to.

(3) *Da Costa v. Edmunds*, 16 R. R.

763 (4 Camp. 142), and *Gould v. Oliver*, 44 R. R. 674 (4 Bing. N. C. 134), are cited in a note.

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may have sanctioned the practice, the master ought not to stow them there without the consent *of the merchant." Upon this passage we may remark that it contains no statement of the exception as a part of either the general law merchant or the law of England. It is said to prevail in practice in this country; the note adding, "So proved in the causes of *Myer* and others v. *Vander Deyl*, Guildhall Sit. before Lord Ellenborough, Ch. J. Dec. 1808, and of *Backhouse* and another v. *Ripley*, before Chambre, J. a short time before." No particulars of these cases being preserved, we cannot know in what manner the question was brought on. In *Ross v. Thwaite*, reported at p. 23 of 1 Park on Insurance (1), and tried before Lord Mansfield at Guildhall, "an action was brought upon a policy of insurance of the captain's goods for six months certain. The loss proved was chiefly for goods lashed on deck, and the captain's clothes, and the ship's provisions. It was proved by an underwriter and a broker, that none of these things are within a general policy on goods; for the risk was greater as to goods lashed on deck than other goods: and a policy on goods means only such goods as are merchantable, and a part of the cargo. They also swore, that when goods like the present are meant to be insured, they are always insured by name, and the premium is greater. Lord MANSFIELD said he thought it consistent with reason, and understood the usage to be so: therefore he advised the plaintiff to withdraw a juror, the premium having been paid into Court, to which he consented."

[*134] When Serjeant Marshall copies this report into his treatise (2), he appends this note. "See however *Da Costa v. Edmunds*," where (3) "it was contended *for the underwriters, that they were not liable, as no communication was made to them of the manner in which" the goods "were to be carried; and it is a general principle that underwriters are not liable for goods stowed on the deck," for which were cited *Ross v. Thwaite* (4), *Backhouse v. Ripley* (5). But "Lord ELLENBOROUGH left it to the jury to say whether it was usual to carry vitriol on the deck, and whether these cargoes were properly stowed. If there was a usage to carry vitriol on deck, the underwriters were bound to take notice of it without any communication, and all they could require was,

(1) C. 1, s. 3, 8th (F. Hildyard's edition.

(2) Vol. 2, p. 736, B. 1, c. 16, s. 5, 3rd ed.

(3) 16 B. R. 763 (4 Camp. 143).

(4) 1 Park, Ins. 23, 8th ed.

(5) Abbott on Shipping, 429, 6th ed.

that these carboys should be properly stowed in the usual manner." Verdict for plaintiff: rule for a new trial refused (1). It is very singular that Lord TENTERDEN does not cite this case; for he expressly lays down the principle on which it was determined. But, before we arrive at the exception to the rule which is here introduced, we must observe on the nature of the rule itself. In the first place it is the creation of positive regulation in the foreign law alluded to, for reasons which may possibly furnish an adequate motive for such enactment. "Goods so stowed," Lord TENTERDEN remarks, "may in many cases obstruct the management of the vessel;" a reason which is by no means universal; for in many cases it may be that particular goods will be best and most safely stowed on deck. But the most important expression of this accurate and careful writer is that which describes the rule as prevailing in practice in this country. For the practice appears to have been, not to lay it down as a rule of law that for goods stowed on deck *the owner of them shall be excluded from the benefit of general average, but to receive the evidence of commercial men respecting the usage of the trade and the general understanding of those engaged in it, and in insuring, which may obviously vary, and require from time to time fresh evidence and different explanations. Again, the reasons that may have produced the foreign enactment, and are cited from Valin, are by no means adopted by Lord TENTERDEN. He mentions indeed only one of them, the danger of obstructing the management of the vessel, but in extremely qualified terms, "goods so stowed may in many cases obstruct the management of the vessel;" a sufficient ground for refusing contribution under particular circumstances, but none for a sweeping forfeiture of all right to recover in respect of goods so disposed. Lastly, the rule laid down by Lord TENTERDEN includes two exceptions, where usage may have sanctioned the practice, and where the master has the owner's consent to stow them there. The usage would affect the question whoever were the parties; the owner's consent only when it happened to arise between him and the master. Plainly then the authority of Lord TENTERDEN does not warrant the large statement respecting the English law which his last learned editor promulges. Indeed this paragraph bears the mark pointed out in the preface as distinguishing his additions to the original work, though it incorporates some parts of that corresponding with it. We may further observe

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(1) 16 E. R. 764 (*Du Costa v. Edmunds*, 2 Chitt. Rep. 227).

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that the two reasons quoted from Valin are not of general application. He says that goods ought not to be stowed on deck, "and can only be, because the vessel is full without them, or because the master has neglected to stow them elsewhere, in either *of which cases, he and his owners are responsible to the shipper, unless the goods were placed there with his consent. Secondly, because there is every reason to presume, that being in the way, they will be thrown overboard, before the necessity of jettison has occurred, on account of the obstruction they create." Now it is obvious that there may be other and valid reasons for stowing goods on deck; indeed some goods could be stowed in no other place, such as timber, and, on some voyages, live animals; and they may certainly be there stowed with proper skill and care, so as not to be in the way of the crew in their operations. These matters of fact may vary with every different trade, or even with every single adventure. The danger of a crew being tempted to throw overboard goods on deck before the ship is in danger is quite insufficient; that danger must depend on their weight and bulk, the manner of stowage, and many other particulars; but the argument would prove too much; for it would apply to whatever goods may be nearest at hand, and consequently likely to be soonest sacrificed. When we say that the reasoning of Valin was adopted by the Court of Common Pleas (in the late case of *Gould v. Oliver* (1)), we must confine ourselves to his reasoning in favour of the owner of goods stowed on deck according to the custom of a particular trade, in accordance with Lord ELLENBOROUGH's decision in *Da Costa v. Edmunds* (2); the LORD CHIEF JUSTICE, without laying down the rule or the mode of proving it, assuming it to prevail in practice, and only deciding that the owner may notwithstanding recover contribution from the shipowner, where the goods were *stowed on deck according to the usage of the trade, for a loss by jettison.

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We have then this exception forming part of the rule; and we have seen that Valin introduces another for which there is no very obvious reason, that of boats or other small vessels going from port to port; a description of the size and destination of vessels which may be somewhat difficult of application. But, although this rule of excluding goods stowed on deck from contribution to general average is not founded on any universal principle, it certainly prevails in practice to a great extent. Serjeant Shee truly states that the law is the same on this subject in England and in

(1) 44 R. R. 674 (4 Bing. N. C. 134).

(2) 16 R. R. 763 (4 Camp. 142).

America; and Judge Story, in his valuable edition of Abbott on Shipping (1), proves this proposition by two decisions. The books in which these are reported are not at hand: but we have already shown that the law of England has stopped very short of the doctrine that no owner of goods stowed on deck shall under any circumstances be allowed to recover contribution on general average. The question between the merchant and the ship-owner may be different from that between either of them and the underwriters, because the former may agree to stow the goods in such a manner that the latter will not be at all responsible for their loss.

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But it seems to the Court, for the reasons assigned, that the mere fact of stowing them on deck will not relieve the underwriter from responsibility, inasmuch as they may be placed there according to the usage of the trade, and so as not to impede the navigation or in any way increase the risk.

Judgment for the plaintiff.

The issues in fact were tried before Lord Denman, Ch. J., at the London sittings after Michaelmas Term, 1840; when a verdict was found for the plaintiffs on the first issue, and for the defendants on all the others. In Hilary Term, 1841, *Sir W. W. Follett*, for the plaintiffs, obtained a rule *nisi* for a new trial or for judgment *non obstante veredicto*.

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At the sittings in banc after last Term (2), *Kelly, R. V. Richards* and *J. Greenwood* showed cause; and *Sir W. W. Follett*, Solicitor-General, *Crowder* and *Butt* supported the rule.

The points discussed, and the course of the argument, will sufficiently appear from the judgment. Several of the authorities mentioned on the argument of the demurrer were referred to; and also the following: *Cunningham v. Fonblanque* (3), Bro. Abr. Customes, pl. 59, *Kennycott v. Bogen* (4), *Dane v. Medhurst* (5), *Combes's case* (6), *Case of Monopolies* (7), Note (9) to 1 Chitty's Bl. Com. Introd. sect. 3, p. 70 (75), FOSTER, J. in *Edie v. East India Company* (8), Doctor and Student, pp. 84, 85, Di. I., ch. 10, Co. Litt. 110 b.

Cur. adv. vult.

(1) P. 355, ed. Boston, 1829.

(2) February 1st and 2nd, 1842.
Before Lord Denman, Ch. J., Patteson,
and Coleridge, JJ.

(3) 6 Car. & P. 44.

(4) 2 Bulst. 250.

(5) Cited, 2 Bulst. 252.

(6) 9 Co. Rep. 75 a. See 75 b.

(7) 11 Co. Rep. 84 b. See 85 b.

(8) 2 Burr. 1216, 1226.

MILWARD LORD DENMAN, Ch. J., in this Term (April 28th), delivered the
 v. judgment of the COURT:
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[*139] This was an action against underwriters, on a time policy effected on a steamer navigating between Waterford and London, for the loss of pigs necessarily thrown overboard in a storm by the master for the safety of *his ship, and which the owner of the ship has been compelled, by the Irish Court of Exchequer, to make good to the owner of them.

To a declaration for this claim several pleas were pleaded. We are required to observe on the following. First; that the pigs were stowed on deck. This plea was demurred to; and on argument we have held it bad, because there may be undoubtedly a state of facts in which the underwriters would be liable for goods stowed on deck.

But at the trial at Guildhall other defences were raised. Two pleas set forth a custom of London, that the owner of goods stowed on deck should not receive any contribution by way of general average from the shipowner in respect of the jettison of goods so stowed, and a similar custom that the underwriters on ship should not be liable to contribute by way of general average in respect of such goods. Another plea stated that the pigs were placed on deck, and, by reason thereof, the management of the vessel was obstructed and the danger of navigation increased, and that the defendants had no notice or knowledge that the vessel would be employed in the carriage of goods on deck. On all these pleas issues were joined; and the verdict was for the defendants: but the jury added, in answer to a question which I submitted to them at the instance of the learned counsel for the plaintiffs, that the goods were shipped according to the usual course of the trade.

[*140] A rule was granted for a new trial, on account of misdirection in telling the jury that there was evidence of the customs laid as customs of London, though the witnesses to prove them said that they also prevail in other English ports. This was said to establish, not a *local custom, but a general law; and the *Solicitor-General* urged that the custom secondly stated amounted to no more than the known principle that underwriters cannot be liable for a risk concealed from them. We are not prepared to agree with the former proposition; as it rather appears to us that the custom might be properly described as a custom of trade in London though it should also exist in other ports. Indeed the

absence of averment of ignorance raises a serious objection to the validity of the customs themselves: for the stowage of goods on deck with the consent of the owner of the goods or of the underwriter could not by any reasonable custom affect his rights against either. The rule, therefore, in the second place, was to enter judgment for the plaintiffs, notwithstanding the verdict found for defendants on these two pleas, the second of which states a custom open to a further objection, that it may assume to vary the obligation created by the policy.

The plaintiffs have a right to ask, and do ask, for a new trial on another ground, contending that the verdict on the last issue was not warranted by the evidence. That issue was whether the stowage on deck did in fact obstruct the navigation, and whether that mode of stowage was known to the underwriters. On the obstruction in fact there was evidence both ways: but, on the knowledge of the underwriters, it was argued as irresistibly following the notoriety of the practice in the employment of steamers in the cattle trade between Ireland and Britain. That knowledge, however, the jury expressly negatived.

In addition to this, the learned counsel for the plaintiffs insisted that the finding of the jury on the collateral question decided the case in his favour. He observed *that, but for the new rules, the Judge at Nisi Prius would have been bound by Lord ELLENBOROUGH's ruling in *Da Costa v. Edmunds* (1) to tell the jury that the plaintiff was entitled, when they found that the stowage on deck was conformable to the usage of this particular trade; because the underwriters are bound to know the usages of the trade in which the vessel is employed. Therefore it was said that I ought to have told the jury that they did in fact know that such usage existed in the Irish cattle trade. But, the issue being precisely on the question whether the defendants actually knew that the vessel would be employed in carrying goods on deck, we cannot think it would be right to enter the verdict that due notice was given, however much the defendants might be bound to take such notice, when the jury found that they had it not. We are not, however, satisfied with the verdict on this point, considering the notoriety of the practice during a very considerable period.

With this doubt on the correctness of the verdict, we make the rule absolute on payment of costs.

Rule absolute on payment of costs.

(1) 16 R. R. 763 (4 Camp. 142).

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REG. v. ROWLEY.

(3 Q. B. 143—147; S. C. 11 L. J. Q. B. 198; 6 Jur. 872.)

An election was held for supplying one extraordinary and three ordinary vacancies in the council of a borough. Two sets of candidates (each consisting of four) were proposed. The votes for the successful candidates were given on papers, each stating the names of the four, but not distinguishing the vacancy which any one was intended to fill. On motion for a *quo warranto* information against one of the four so elected,

The Court held the election bad, under stat. 5 & 6 Will. IV. c. 76 (2), ss. 32, 47, and made the rule absolute (1).

Although statements were made in opposition to the rule, showing that no real misunderstanding existed, and imputing bad faith to the parties impeaching the election.

Held, by Lord DENMAN, Ch. J. and PATTESON, J., that an election of councillors, if regular in other respects, is not bad because held to supply both ordinary vacancies and an extraordinary vacancy made some time before. And, by PATTESON, J., that an elector may give votes for all the candidates on the same paper; only making the proper distinction as to the vacancies to be supplied.

A RULE *nisi* was obtained last Hilary Term for a *quo warranto* information against Thomas Rowley, for exercising the office of a councillor of the borough of Lichfield. The material facts, as stated on the affidavits in support of the rule, were as follows.

Taylor, a councillor of the South Ward, whose office would have expired by efflux of time on November 1st, 1843, became disqualified, and his office was thereupon declared void on the 30th October, 1841. On the same day notice was given of an election to be holden on November 1st to supply the vacancy, and also of an election to be then holden to supply the places of three *other councillors of the South Ward, whose offices then expired by efflux of time. On the election, Bond, Rowley, Gorton and Vale were declared the persons elected. Four other candidates had been proposed. On examination, it appeared that all the voting papers given in favour of the successful parties were in the form: "I vote for Frederick Bond, Butcher Row, attorney-at-law, Thomas Rowley, Tamworth Road, physician," &c., naming and describing each of the parties voted for, but not otherwise distinguishing them, nor showing which candidate was intended by the voter to supply the extraordinary vacancy. One voting paper was put in for Garratt (an unsuccessful candidate) to supply the place of Taylor: and

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(1) The information was tried before Tindal, Ch. J., at the Stafford Summer Assizes, 1842, when a verdict was found and judgment given for the Crown. The judgment was affirmed

in Ex. Ch. 6 Q. B. 668, 14 L. J. Q. B. 62.—A. C.

(2) Repealed by Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 5.—A. C.

thirteen others, also in the proper form, were tendered for him, but (as was alleged, improperly) refused. The affidavits in opposition to the rule stated that the number of votes for the successful candidates were, for Bond 141, Rowley 141, Vale 140, Gorton 140; and that no other candidate had more than 121 (1). The presiding alderman and assessor on the 3rd of November declared and published that the said four candidates were duly elected; and they at the same time signified to Bond, Rowley, and Vale that they were elected in place of the three councillors who regularly went out of office on November 1st, and to Gorton that he was elected in the place of Taylor; in which those four parties respectively concurred. The affidavits also stated that, on 9th August, 1841, it was mentioned at a meeting of the council that Taylor's office would shortly become vacant, and the council then agreed unanimously *that, to save trouble and expense, the election to fill up the extraordinary vacancy should take place on November 1st, at the same time with the election to supply the three ordinary vacancies then occurring, which arrangement was acquiesced in, and acted upon, by Smith, the now proposed relator, Greene, one of the unsuccessful candidates, who made affidavit in support of the present rule, and other persons promoting the election of the last-mentioned candidates. That the two sets of candidates were publicly named by their respective parties, on handbills and otherwise, distinguishing those intended respectively to fill the ordinary and extraordinary vacancies. That voting papers in the form objected to were used on both sides at the election, and no objection made there by any person: that Greene and Smith were present at the election, and Greene voted: and that he knew of votes being given in the manner now complained of.

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Waddington and Cole now showed cause:

First, Rowley was duly elected. Secondly, the case at all events is one in which the Court, exercising its discretion, will not interfere. As to the first point, there could be no doubt, from the manner in which all the proceedings were conducted, that Bond, Rowley, and Vale were the persons elected to fill the ordinary vacancies. There is no illegality in filling up vacancies of each kind

(1) The votes for the other candidates were as follows: For Greene 121; Walthew 114; Holmes 113; Garratt 6. The number of burgesses in the ward who did not deliver voting

papers was about 13. The affidavits in opposition to the rule stated that the thirteen persons excluded from voting were rejected because they had voted already.

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at one and the same election. It is true that the councillor who is to go out of office first must be designated; but that was sufficiently understood: and stat. 5 & 6 Will. IV. c. 76, s. 82, which regulates the manner of voting, contains nothing prohibitory of the mode here adopted. Had such mode *been thought incorrect, errors of that kind would probably have been among those cured by stat. 7 Will. IV. & 1 Vict. c. 78, s. 11; but they are not noticed in that clause. *Rex v. Champion* (1) is an authority against the rule. As to the second point, the affidavits prove that the application is not made in good faith, nor founded on any real subject of complaint; and *Rex v. Parry* (2) shows that allegations of this kind may properly be noticed by the Court. The success of this application would cause four vacancies in the council. Each of the four councillors whose title is impeached would have had a majority on the whole number of voters in the borough, if all had voted.

Sir W. W. Follett, Solicitor-General:

The question is, whether an election can be supported where there were three ordinary vacancies and one extraordinary, and the votes for the successful candidates were given without specifying in any instance which vacancy the candidate was to fill.

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(LORD DENMAN, Ch. J.: If that distinctly appears, there can be no doubt. It is as if the livery of London were to elect two sheriffs and a bridgemaster without saying which candidate was to fill either *of the offices. This objection would supersede any question as to the relators, because it would appear that there had been no election at all. There could have been no objection to the votes being given at the same time for filling all the vacancies, if it had been done properly.

(PATTERSON, J.: There is no objection to the votes being all given on the same paper, if a proper distinction were made. But, if that

(1) *Waddington* cited this case from the *Jurist*, vol. i. pp. 380, 1117. The motion there (for a *quo warranto* information) was made on two grounds; one not relevant to the question above discussed. On the other, the case does not appear to be an authority. The report cited (p. 381) states that "The Court made the rule absolute, without hearing *Sir W. Follett*, who was to have argued in support of it." The case was not published in these

reports, Lord DENMAN, Ch. J. having said, when disposing of the case as above mentioned (May 25th, 1837), "We give no opinion. There must be a *quo warranto*." It appears to be one of the cases mentioned in *Reg. v. The Mayor, &c., of Bridgewater* (10 Ad. & El. 281), in which *quo warranto* informations were filed, and judgment suffered by default.

(2) 45 R. B. 614 (6 Ad. & El. 810, 820 *et seq.*).

be not done, a man may be declared elected to supply the ordinary vacancy, though some of the voters may have intended to fill the extraordinary one.)

REG.
C.
ROWLEY.

(*Sir W. W. Follett* was not further heard.)

LORD DENMAN, Ch. J. :

I do not see how this election can be maintained. The rule must be absolute.

PATTESON, WILLIAMS, and WIGHTMAN, JJ. concurred.

Rule absolute.

BAKER v. JOHN GREENHILL AND OTHERS (1).

(3 Q. B. 148—165; S. C. 11 L. J. Q. B. 161; 2 G. & D. 435; 6 Jur. 710.)

1842.
April 22.

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Where lands charged with repair of a bridge are occupied by a person not the owner, the occupier is primarily responsible to the public for the repairs, but may demand reimbursement from the owner.

A landowner, liable among others to repair a bridge, *ratione tenuræ*, demised the land, and the lessee covenanted to pay the rent, clear of land tax and all other taxes and deductions whatsoever, either Parliamentary or parochial, taxed or imposed, or to be taxed or imposed, upon the premises or upon the lessor in respect thereof, the landlord's property tax only excepted. By statute, reciting the liability *ratione tenuræ*, and that part of the bridge was out of repair, it was enacted that the landowners liable as above should repair, and keep in repair, the said parts, during the continuance of the Act: and, on their default, road trustees appointed under the Act were empowered to do the repairs and recover against the owners: a power of distress, under a justice's warrant, was also given, to enforce payment. And, for raising the sums required, power was given to the landowners to call meetings, and to meet and make rates according to the value of the chargeable lands: such rates to be levied, if necessary, by distress. A subsequent Act, also reciting the above mentioned liability, made further provisions as to the holding of such meetings and laying rates for the said repairs.

Held that the original liability for contribution to repairs did not, by these enactments, become a Parliamentary tax or deduction within the lessee's covenant,

And, therefore (the Court finding no clause in the above statutes which extended the ultimate liability to lessees or occupiers as well as owners),

That the lessee, having been compelled, in the lessor's default, to pay a rate made as above, and charged upon him as lessee and occupier, might (in manner pointed out by one of the statutes) recover the amount from the lessor.

ASSUMPSIT for money paid and money had and received, and on an account stated. Plea, *Non assumpsit*. On the trial, before Lord Denman, Ch. J., at the sittings in London after Hilary Term, 1840,

(1) Distinguished in *Thompson v. Neale* (1871) L. R. 6 C. P. 240, 243, 40 *Lapworth* (1868) L. R. 3 C. P. 149, 158, 37 L. J. C. P. 191.—A. C. L. J. C. P. 74; and approved in *Jeffrey*

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the plaintiff had a verdict for 80*l.* 7*s.* 6*d.*, subject to the opinion of this Court, on a special case, which was stated, in substance, as follows.

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By indenture of May 31st, 1811, William Greenhill, then seised in fee of the premises after mentioned, demised to John Naylor and William Vooght, their executors, administrators and assigns, two messuages and other premises in the indenture mentioned for thirty-one years from the 24th of June then next, at a yearly rent of 165*l.*, payable on the usual quarter days; and Naylor and Vooght, for themselves, their executors, &c., covenanted with Greenhill, his heirs, executors, administrators and assigns, to pay Greenhill, his heirs, &c., the said rent, "free and clear of and from any land tax and *all other taxes and deductions whatsoever, either Parliamentary or parochial, then already taxed or imposed, or thereafter to be taxed, charged or imposed upon the said demised premises, or any part thereof, or upon the said William Greenhill, his heirs, executors, administrators or assigns, in respect thereof: the landlord's property tax or duty only excepted."

The premises comprised in this lease are situate in the parish of Westham, in the county of Essex, and, together with other property situate at different parts of that parish, and altogether forming less than one-fourth of the entire parish, were formerly parcel of the possessions belonging to the monastery or abbey of Stratford Langthorne in the said county, which lands were liable, *ratione tenuræ*, to the repair of two bridges called Bow Bridge and Channelsea Bridge, and the road, causeway and wharfing mentioned more particularly in the Acts of Parliament hereinafter referred to: and at the time of making the said indenture the said W. Greenhill, in respect of the said premises thereby demised, and by reason of his tenure thereof, was bound to contribute to support, maintain and keep in repair the said two bridges, road, causeway and wharfing. All the said lands were and are tithe free. The said lease and the term thereby granted are still unexpired.

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Stat. 25 Geo. III. c. 124, entitled "An Act for amending and keeping in repair, the road from Whitechapel Church, in the county of Middlesex, to Shenfield, and the furthestmost part of the parish of Woodford, towards Epping; and from the causeway in the parish of Low Layton, to the end of the said parish of Woodford, next Chigwell, and through the parishes of Chigwell and Lambourn, in the county of Essex; and for lighting and watching" *&c., continues the term granted by former Acts therein recited for the further period of twenty-one years, and from

thence to the end of the next Session of Parliament; it appoints trustees and regulates their succession, and imposes tolls to be taken on the roads &c.

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Sect. 35 recites as follows: "And whereas five several bridges, lying or being upon the road between the said town of Bow and the ward of Stratford, in the said county of Essex, are and ought to be repaired, maintained, and kept in repair, by several owners and proprietors of lands and hereditaments thereto adjoining, by reason of their respective tenures, and are not chargeable or to be charged on the said county of Essex; (that is to say) two of the said bridges, called Bow Bridge and Channelsea Bridge, by the owners and proprietors of divers lands and hereditaments heretofore parcel of the possessions belonging to the monastery or abbey of Stratford; two other of the said bridges, called Peg's Hole Bridge, and St. Michael's Bridge, by the Mayor and commonalty of the city of London, by reason of their tenure of several water-mills, lands" &c.; "and one other bridge called by the name of St. Thomas of Acre's Bridge, by Thomas Chambers, Esq., son of Sir Thomas Chambers, Knight, deceased, and his heirs, by reason of the tenure of a water-mill" &c.; "and whereas all the road and foot causeway, and the wharfing by the side thereof, lying between Bow Bridge and Channelsea Bridge aforesaid, ought to be repaired, maintained, and kept in repair, by and at the sole costs and charges of the owners and proprietors of the manors, lands, tenements, and hereditaments, which heretofore were parcel of the possessions belonging to the said late monastery or abbey of Stratford": this section then further recites that the said foot causeway and wharfing *are in a ruinous condition, and enacts that the said owners and proprietors of the said abbey lands and tenements shall, within six months after the passing of the Act, cause, at their own costs and charges, the said foot causeway and wharfing to be substantially repaired, and at the like costs, during the term of that Act, keep and maintain the same in good and substantial repair; and, in case of default, the trustees acting in execution of the Act are empowered to do the necessary repairs, and to recover the expense from the said abbey land owners and proprietors. Section 36 recites as follows: "And whereas the owners and proprietors of the said abbey lands are now willing and desirous to come to a composition, to be paid in money yearly, during the continuance of this Act, for repairing and maintaining all the said road, exclusive of the said causeway and wharfing between Bow

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Bridge and Channelsea Bridge (other than and except the bridges which are to be repaired, maintained, and kept, at the charge of the respective persons obliged by tenure to repair, maintain, and keep the same as aforesaid)”: this section then enacts that after 25th March, 1785, “the owners and proprietors of the said abbey lands and tenements chargeable to the repair of the said road should be charged and liable to pay yearly,” during the continuance of that Act, “for and towards such repairs of the said road as they are liable to as aforesaid, exclusive of their two bridges, called Bow Bridge and Channelsea Bridge, and the said foot causeway and wharfing,” the sum of 55*l.*; which sum was vested in the said trustees, with power, in case of default in payment after demand at the house or usual place of abode of any one of the said abbey land owners living in the said parish of Westham, to levy the same (under *warrant of a justice, grantable on oath of such default) by distress and sale of any cattle, or goods, lying or being in or upon the said abbey lands or tenements, or any part thereof. Section 37, after reciting that “the said abbey land owners stand and remain obliged and liable to the repair of Bow Bridge and Channelsea Bridge, as formerly,” enacts “that if any owner, proprietor, or occupier of any parcel or parcels of the said abbey lands shall refuse or neglect to pay such sum or sums of money as shall be payable by him, her, or them respectively, towards the repair of the said two bridges by the said abbey land owners, proprietors, or occupiers to be repaired and kept in repair, it shall be lawful for one or more justice or justices of the peace residing in the parts next adjoining,” on complaint by one or more of the abbey land owners, to issue his warrant to levy by distress.

Sect. 38. “And for the better enabling the said abbey land owners to raise the money expended by or recovered of them for the first great repair and amendment of the said foot causeway and wharfing, and the expense of keeping the same in repair for the future, and the said composition money, by rates amongst themselves, and to reimburse any person or persons on whom any such distress or distresses may be made for the same as aforesaid, and also to enable them to raise any sum or sums of money for or towards the repair of Bow Bridge and Channelsea Bridge, or either of them (which they are also liable to repair and keep in repair by reason of their tenure of their said lands), together with the charges and expenses of making and collecting the said rates, be it further enacted, that it shall be lawful for the said abbey land owners, or

any one or more of them, from time to time to call a meeting or *meetings of abbey land owners for the purposes aforesaid, at any place or places within the ward of Stratford Langthorne, wherein the said abbey lands lie, by giving to or leaving for the several abbey land owners, residing within the said ward, at their usual places of abode, and to or for the tenants (residing within the said ward) of such of the said abbey land owners as do not so reside, six days at least before such intended meeting, notice in writing of the times and places of such meetings respectively, and also by giving such other public notice thereof as by the said abbey land owners shall be agreed on between themselves, at which times and places, so respectively to be appointed, the said abbey land owners, and such other persons as shall be deputed and authorised by them, or the major part of them, who shall be then and there present, shall and may make such rates and assessments, from time to time, for the purposes aforesaid, or any of them, by a pound rate, according to the rents or values of their respective lands and tenements as aforesaid, with power to moderate the same with respect to any houses, new buildings, or improvements, as shall be agreed on by the major part of the said persons present at such meetings; and such rates and assessments, being so made under the hands of the said abbey land owners, and persons deputed as aforesaid, or the major part of them present at such meetings, shall be good and binding on all the said abbey land owners."

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Sect. 39 provides for collecting such rates and assessments, and enforcing them by distress and sale of the goods of the person so assessed and making default, or of any occupier of any lands, &c., for which the sums in arrear were assessed, or any goods &c. upon such lands. Sect. 40 gives to any person aggrieved by any such *rate an appeal to the Quarter Sessions. Sect. 41 provides "that where any occupier or occupiers of any of the said abbey lands, messuages, or tenements, shall, by virtue of any distress, or otherwise, pay any sum or sums of money charged or assessed on the owner or owners of such lands, messuages, or tenements, or which such owner or owners ought to pay or bear, by virtue of this Act, in every such case it shall be lawful for such occupier or occupiers to deduct the money so paid out of any rent or rents then due, or thereafter to grow due, to such owner or owners, for or in respect of the same messuages, lands, or tenements, any law, usage, or custom, to the contrary notwithstanding."

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The case then stated the passing of stat. 43 Geo. III. c. lxvi.

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(local and personal, public), continuing the term granted by the former statute : and stat. 7 & 8 Geo. IV. c. cviii. (local and personal, public), entitled "An Act to enable the persons interested in the lands and hereditaments heretofore parcel of the possessions of the monastery or abbey of Stratford Langthorne in the county of Essex, to raise money for repairing and maintaining the bridges and other works, liable to be repaired and maintained by such persons." Both these Acts were to be considered part of the case : none of the clauses were set out (1).

(1) Stat. 7 & 8 Geo. IV. c. cviii., local and personal, public, sect. 1, recites that "the owners, proprietors, lessees, and occupiers of divers lands, tenements, and hereditaments, heretofore parcel of the possessions belonging to the monastery or abbey of Stratford Langthorne in the county of Essex, are, by reason of their respective tenures or otherwise, bound to support, maintain, and keep in repair two bridges, situate and being at Stratford in the county of Essex ; that is to say, a certain bridge lying and being upon the King's highway and turnpike road between the town of Bow in the county of Middlesex, and the town of Stratford aforesaid, called Bow Bridge, and one other bridge, near, adjoining *to, or within the said town of Stratford, called Channelsea Bridge ; and also to support, maintain, and keep in repair certain parts of the road and foot causeway, and the wharfing &c., and that it is expedient that they should be enabled to raise the requisite sums &c. ; and enacts that "the affairs and concerns of the owners, proprietors, lessees, and occupiers of all the lands, tenements, hereditaments, and premises, heretofore parcel of the possessions belonging to the said monastery or abbey of Stratford Langthorne, shall be conducted and managed under and subject to the several rules and regulations hereinafter mentioned, specified, and contained."

Sect. 2 provides for the holding of general and special meetings of the "owners, proprietors, lessees, and occupiers," at which all questions shall be decided "by a majority of

votes of the owners, proprietors, lessees, and occupiers, present" &c., every one of whom is to be entitled to one vote, and to a further vote for every 100*l*. to which he shall have been rated &c. ; and "not more than one person shall be entitled to vote for and in respect of the same land &c. ; and, if more than one shall claim in respect of the same land &c., the right shall be in him who shall ultimately have to pay the rates or allow them out of the rent. Provision is also made (sect. 5) for constituting a committee of management.

Sect. 13 enacts "that it shall and may be lawful for the owners, proprietors, lessees, and occupiers of the lands, tenements, and hereditaments aforesaid, from time to time, at any general or special general meeting to be held under this Act, to make any rate or assessment for the purposes of this Act, in respect of such lands, tenements, or hereditaments, by a pound rate upon all such owners, proprietors, lessees, or occupiers, according to the rents or values of the respective lands, tenements, or hereditaments, and according to the several interests of the owners, proprietors, lessees, and occupiers thereof respectively, and to apportion such rates according to such several interests, and to moderate or regulate such rates with respect to any houses, new buildings, or improvements, in such manner as shall be agreed on by the major part of the persons present at any such quarterly or special general meeting ; and a table of such rates and assessments, being from time to time made and

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Before the making of the distresses, and the payments of rent, after mentioned, the plaintiff had, by assignment, become possessed of, and was then entitled to, *the residue of the term granted by the said lease, and was liable as assignee upon the covenants. And the defendants had become legally seised of the reversion in fee expectant on the determination of the said demise. William Greenhill, the lessor, died seised in 1832, having devised the premises, by will duly executed to pass real estates, to the defendants, who assented to and accepted such devise.

The case set out three rates made on the premises in question in January, 1836, July, 1837, and October, 1838, by the persons authorised under the statutes. In each of the two latter rates (1), the parties interested in the premises were described as follows: "Owner. Greenhill's executors.—Lessee. Tucker.—Occupier. John Tucker." Tucker occupied part of the premises as plaintiff's agent, and to conduct his business there.

From the time of granting the said lease down to 1836, W. Greenhill in his lifetime, and the defendants afterwards, always paid the rates and assessments made under the said Acts, upon and in respect of the demised premises, or allowed the amount, when paid by the lessee or occupier, to be deducted from the rent payable under the said lease, without objection or dispute. When John Tucker (being, as the plaintiff's agent as *above mentioned, in the occupation, and having the care, of the premises) paid the quarter's rent due at Christmas, 1836, he deducted from that quarter's rent, on behalf of the plaintiff, the amount of the rate for that year above set out, and which he had paid. The defendants then

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signed by the persons, or the major part of them, present at any such meeting, shall be good and binding upon all such owners, proprietors, lessees, and occupiers respectively, and upon all other persons concerned."

Sect. 15 provides for levying the rates by distress on the goods of any "owner, proprietor, lessee, or occupier of any messuage, land, tenements, or hereditaments," neglecting or refusing to pay.

Sect. 17 provides and enacts "that whenever any occupier of any such lands, tenements, or hereditaments aforesaid shall, by virtue of any distress or otherwise, pay any sum or sums of money charged or assessed on

any owner, proprietor, or lessee of such lands, tenements, or hereditaments, or to the payment of which such owner, proprietor, or lessee shall be liable by virtue of this Act, in every such case it shall be lawful for any such occupier to deduct the money so paid out of any rent or rents then due, or thereafter to grow due, to such owners, proprietors, or lessees, for and in respect of the same lands, tenements, or hereditaments; any law, usage, or custom to the contrary notwithstanding."

(1) In the rate of 1836 the only description of persons was: "Party assessed. Greenhill's executors.—Tucker & Co."

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denied the plaintiff's right to make such deduction. They received the next quarter's rent without prejudice to their claim for the amount withheld at Christmas.

The said rates of 1837 and 1838 were regular in point of form, unless the mode of describing therein the parties assessed affects their validity. Mr. John Tucker, named therein, at the respective times of making the said rates, was in the actual occupation of the demised premises, but as the plaintiff's agent only (as before stated). The defendants, at the said times, were the executors of Greenhill, and are the persons so described therein. Tucker, as the plaintiff's agent, and by his authority, refused to pay the rates, whereupon summonses to him, and distress warrants against his goods, were issued to enforce payment: and, to prevent sales of the plaintiff's property on the said premises under the warrants, Tucker, as his agent, and on his account, paid the sums assessed and costs, amounting together to 30*l.* 7*s.* 6*d.*

The plaintiff claimed to deduct this amount in a subsequent payment of rent to the defendants: but they refused to allow it; and the plaintiff, under threat of distress for the rent, paid it in full, taking a receipt which stated it to be paid without prejudice.

The questions for the opinion of the Court were: 1. Whether the defendants were liable to pay the said rates, and to pay the plaintiff the said sum of 30*l.* 7*s.* 6*d.*, by the statutes referred to or otherwise, independently of the provisions contained in the said lease: and, if so, *2. Whether the said rates are taxes or deductions which the lessee is bound to pay by the covenant contained in the said lease. If the Court should be of opinion that the defendants were so liable, and that the said rates were not taxes or deductions within the meaning of the covenant, the verdict was to stand; but, if the Court should be of a contrary opinion, a nonsuit to be entered.

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The case was argued in Michaelmas Term, 1841 (1).

Sir W. W. Follett, Solicitor-General, for the plaintiff:

First, the plaintiff is not liable to these repairs by his covenant. *The Stratford Bridge* case (2) and *Rex v. The Inhabitants of Middlesex* (3) show that the burden of repair lay upon these abbey lands,

(1) November 9th. Before Lord Denman, Ch. J., Williams, Coleridge, and Wightman, JJ. *tants of Kent*, 2 M. & S. 519, 520, note (a)).

(3) 37 R. R. 396 (3 B. & Ad. 201).

(2) 15 R. R. 330 (*Rex v. The Inhabi-*

ratione tenuræ, from the time of their being granted. It was like the liability to a quit rent or fee farm rent. When the lands became divided, each owner was contributory. William Greenhill, the deviser, was one of these: and he granted his portion at a rent of 165*l.*, “free from any land tax, and all other taxes and deductions whatsoever, either Parliamentary or parochial, then already taxed or imposed, or thereafter to be taxed” &c., “upon the said demised premises, or any part thereof, or upon the said William Greenhill, his heirs, executors, administrators, or assigns, in respect thereof, the landlord’s property tax or duty only excepted.” Repair, *ratione tenuræ*, is not, in its own nature, a deduction within the meaning of these words. The tenant is no more chargeable in respect of it than he would have been for a mortgage granted *by the landlord. Nor is this a Parliamentary tax or deduction, under any of the statutes. Stat. 25 Geo. III. c. 124 does not impose any tax. The clauses cited in the case only direct how those contributions for which the several land owners were already liable may be raised conveniently and without litigation. It is a levy under Parliamentary authority, but not a Parliamentary tax, which means an imposition laid by Parliament for the benefit of the State. Stat. 7 & 8 Geo. IV. c. cviii. does not alter the case. That Act was passed, as its title shows, to facilitate the raising of money by persons already liable for these repairs. Lessees and occupiers, though mentioned in sects. 1, 13, 15, and 17, were liable before this statute: and the statute does not anywhere profess to create any new liability, or change any existing contract. Sect. 13 is a corresponding clause to sect. 38 of stat. 25 Geo. III. c. 124: the latter speaks only of the abbey land owners as the persons who are to attend the meeting; the other specifies also lessees and occupiers as persons who may act there: but this was not meant to affect any person’s liability, or introduce any tax. The fact that William Greenhill paid this rate till his death shows how the covenant was understood by the original parties. If it be objected that the present rates are incorrect in describing the owners of the property as Greenhill’s executors, whereas they are his devisees in fee, the answer is, that such an objection was a ground of appeal, which remedy is given by stat. 25 Geo. III. c. 124, s. 40.

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Sir F. Pollock, Attorney-General, *contra* :

The duty of repair, *ratione tenuræ*, does not necessarily lie upon the owner of the lands in fee. It appears from the *remarks of

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the Court in *Rex v. Sutton* (1), and from *Regina v. Bucknell* (2) and other authorities, there cited, that the occupier is liable, independently of any contract or legislative provision. Occupiers, as well as owners, are mentioned in stat. 25 Geo. III. c. 124 (3) : and in clauses, which omit that word, the term “owners” is used in a popular sense, which will include the actual occupier. The object both of that Act and of stat. 7 & 8 Geo. IV. c. cviii., was, without reference to any technical distinction, to throw the burden upon those actually enjoying the benefit of the land, according to their respective interests. This intention is clear in the latter statute, particularly from the recital in sect. 1, and from sects. 2 and 13. Neither the plaintiff nor the defendants are named in the rate, according to their respective interests or otherwise. No one is mentioned as owner but Greenhill’s executors. Tucker, the occupier, was rated: a distress warrant issued against him; and he paid the rate to avoid a levy. The plaintiff is not entitled to maintain this action because he has reimbursed Tucker. Further, the covenant in the lease at any rate frees the defendants from this burden; for, if not a tax, it is a deduction, and a Parliamentary one. To give it that character it is sufficient, according to *Waller v. Andrews* (4), that the rate is laid by persons deriving their authority from an Act of Parliament.

(COLERIDGE, J.: From what would this payment of rate be a deduction?)

From the rent, by stat. 7 & 8 Geo. IV. c. cviii., s. 17.

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Sir W. W. Follett, Solicitor-General, in reply :

That an occupier is liable to the burden *ratione tenure* is true, as between him and the public, because they must necessarily look to him, not knowing who is the owner. That is the reason given in note (9) to *Rex v. Stoughton* (5), where this point is discussed, and *Rex v. Kerrison* (6) is cited in a note (b), by the last editors. The ultimate liability rests upon the person really chargeable by reason of his tenure; and the occupier who pays has his remedy against

(1) 42 R. R. 490 (3 Ad. & El. 597).

(2) 7 Mod. 55, 98. S. C. 2 Ld. Ray.
792, 804; 4 Vin. Abr. 288, tit. Bridges
(B), pl. 26, and in marg.;

(3) Sect. 37.

(4) 49 R. R. 610 (3 M. & W. 312).

(5) 2 Wms. Saund. 157, 158 d.

(6) 14 R. R. 491 (1 M. & S. 435);
16 R. R. 342 (3 M. & S. 526).

that person. If it had been contemplated, by the statutes now in question, to alter these rights and liabilities, proper language for that purpose would have been used. Sects. 38, 39 and 41 of stat. 25 Geo. III. c. 124, show that the land owners and no other persons were intended to be liable under that Act: and, even if the words of stat. 7 & 8 Geo. IV. c. cviii., were doubtful, they could not transfer the liability to others. Occupiers are mentioned in sect. 1; but they could not be liable "by reason of their" "tenures." Their attendance at meetings under sects. 2 and 13 cannot fix liability upon them. Sect. 17 contemplates the ultimate liability of an owner, or a lessee bound to payment of the rates by his contract. As to the form of the rate, supposing the objection open, the defendants are in fact (as the case states) executors of William Greenhill. The plaintiff was not assessed: but, having paid money to redeem his goods from distress, he is entitled to claim reimbursement from the defendants. The real question is on the covenant. The word "deductions," there, is relied upon by the defendants; but they must be deductions *ejusdem generis* with the "land tax" and "other taxes" mentioned before; and they must be "Parliamentary or parochial." The sewers' rate in *Waller v. Andrews* (1) was a tax properly so called, imposed by the Commissioners of Sewers in the execution of their public duty; the rate here is of an entirely different character.

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Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (April 22), delivered the judgment of the Court:

This was an action by the assignee of a lease for years of certain premises at Westham, Essex, formerly part of the possessions of the abbey of Stratford, against the assignees of the reversion, to recover a sum of 30*l.* 7*s.* 6*d.*, which the plaintiff had been compelled to pay towards the repair of two bridges, which the proprietors of the demised premises, and of other lands formerly belonging to the abbey of Stratford, were bound to repair *ratione tenuræ*. And the question is whether, either by the terms of the lease under which the plaintiff held, or by the Acts of Parliament referred to in the case, or by the common law, the plaintiff was chargeable with the whole or any part of the money raised for the purpose of such repair.

With respect to the liability at common law to the repair of

(1) 49 B. R. 610 (3 M. & W. 312).

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bridges *ratione tenuræ*, the result of the authorities seems to be to throw the charge ultimately upon the owner, though primarily, as far as the public are concerned, the occupier may be the person chargeable by indictment in case of non-repair: *Reg. v. Bucknell* (1); Hawk. P. C. b. 1, c. 77, s. 8 (2), and the *cases there cited: and it would seem from those authorities that, if the owner of land charged with the repair of a bridge *ratione tenuræ* suffer it to be out of repair, and the occupier of the land be indicted and fined, he would be entitled to look for reimbursement to the owner who ought to have repaired, and who holds the land by the service of repairing the bridge.

Independently, then, of the lease and the Acts of Parliament, the lessee would not in this case, as between him and his lessor, the owner of the premises, be liable to the charge of the reparation of the bridges. But the lease contains a covenant for payment of the rent free and clear, "of and from any land tax and all other taxes and deductions whatsoever, either Parliamentary or parochial," "charged or imposed upon the said demised premises" then or thereafter, or upon the lessor in respect thereof: and it is contended that the amount assessed in respect of the premises for the bridge is a Parliamentary tax within the meaning of the covenant. We are, however, of opinion that the Acts of Parliament for enabling the persons interested to raise the necessary funds for repairs of the bridges by contribution amongst themselves do not impose any tax within the meaning of the covenant. The charge was already created; and the Acts merely supply a more convenient mode for raising the necessary funds to meet it. And we therefore think that the lessee was not liable by his covenant to be charged with the amount in question.

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It is however contended, on the part of the defendants, that, though the plaintiff may not be liable to the charge either by the terms of the lease or at common law, he is so to some extent at least, if not to the whole, by virtue of the Acts of Parliament referred to in *the case. These Acts are three in number; 25 Geo. III. c. 124, 48 Geo. III. c. lxvi., and 7 & 8 Geo. IV. c. cviii., which is the Act now in force, the two former having expired. The first of these Acts, both in the recitals and the enacting clauses, treats the owners and proprietors of the abbey lands as the persons chargeable with the repairs, and to contribution amongst themselves; and, though, in the case of non-payment, distresses may be

(1) 7 Mod. 55, 98.

(2) Vol. 2, p. 258, 7th ed.

made upon the occupiers upon the land, the latter are enabled to deduct the amount from the rent: nor is there any clause in that or the 43 Geo. III. c. lxvi. to fix lessees or occupiers with any portion of the burthen.

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It is however contended, for the defendants, that stat. 7 & 8 Geo. IV. c. cviii. expressly authorises and directs an apportionment of the charge between the owners and their lessees according to their several interests; and that the rate which the plaintiff was compelled to pay was defective in not making such an apportionment. The Act undoubtedly does contain clauses which at first sight would appear to favour such an argument. But, taking the whole Act together, we are of opinion that all the clauses are reconcilable with the general liability of the owners and proprietors to the exclusion of the lessees, and that it was not the intention of the Legislature to impose upon the lessees or occupiers any charge to which they were not otherwise liable. The thirteenth section was mainly relied upon for the defendants. By that section, the owners, proprietors and lessees and occupiers of the lands are empowered, at a meeting to be held under the Act, to make an assessment by a pound rate upon all such owners, proprietors, lessees or occupiers, according to the rents or values of *the
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respective lands, tenements or hereditaments, and according to the several interests of the owners, proprietors, lessees and occupiers thereof respectively, and to apportion such rates according to such several interests, and to moderate or regulate such rates with respect to any houses, new buildings or improvements, in such manner as shall be agreed on by the major part of the persons present at any such quarterly or special general meeting. But, by sect. 2, not more than one person is entitled to vote at any meeting in respect of the same premises: and, if more than one person claims to vote in respect of the same premises, the right of voting is to be in the person who is ultimately to pay the rates or allow them out of the rent. The terms of the thirteenth section will be satisfied by applying it to cases of contribution between owners having different interests in their respective properties, and between landlords and tenants where the latter may have covenanted to pay the rent clear of any deduction on account of the charge, without interfering with the general rule that in the absence of such a covenant the owner is liable to the charge. In this view of the case it appears to us that the rate sufficiently indicated the charge and the party chargeable, and that the amount

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ought to have been allowed by the defendants; and, consequently, that the plaintiff is entitled to judgment upon both the questions submitted to the Court.

Judgment for plaintiff.

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May 6.

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REG. v. THE LONDON AND GREENWICH RAILWAY COMPANY.

(3 Q. B. 166—176; S. C. 11 L. J. Q. B. 187; 2 G. & D. 444; 3 Ry. Cas. 138; 6 Jur. 892.)

By the Greenwich Railway Act, 3 & 4 Will. IV. c. xlvi., the Company were empowered to take lands, &c., making recompense &c., and it was enacted (sect. 45) that, if any person were applied to by them to sell any part of any house, warehouse, &c., in actual occupation, and should require the Company to treat for the whole, and if they should not be willing to purchase the whole of such house, warehouse, &c., such person should not be obliged to sell them a part only. Sect. 46 provided in like manner as to particular properties therein named, enacting that, if the Company would not purchase the whole, the owner or lessee should not be obliged to sell less than the whole of such property. Sect. 47 enacted that, if the owner, &c., of any house, manufactory, ground or building, which should be situate within fifty feet of the railway, should give notice to the Company to purchase his interest in such houses, manufactories, ground or building, the Company should treat for the purchase of his interest in the houses, manufactories, ground and buildings mentioned in such notice, and, in case they should not agree, the compensation should be settled by a jury, whom the Company might cause to be summoned. There were clauses providing for the recovery of compensation by owners of buildings, lands, &c., for damage, generally, occasioned by the execution of that Act.

S. & Co. were lessees of premises, on which were a vinegar manufactory, warehouses, &c., a principal dwelling-house and garden, and five smaller dwelling-houses, which premises were so situated that a straight line drawn parallel to the railway at the distance of fifty feet would divide the principal dwelling-house and the garden, but would pass between the rest of the premises and the railway. S. & Co. required the Company to purchase their interest in the whole premises. The Company refused, but offered to purchase the principal dwelling-house and garden.

Held, that the Act did not oblige them to purchase more: and a rule for a *mandamus* to the Company to cause compensation to be assessed for the whole was discharged.

THESIGER, in last Hilary Term, obtained a rule *nisi* for a *mandamus* calling upon the above named Company to issue their warrant to the sheriff of Surrey, under stat. 3 & 4 Will. IV. c. xlvi. (local and personal, public), to impanel &c. a jury, "to inquire of, assess and ascertain and give a verdict for the sum of money to be paid by the said Company to Messrs. Noah Slee, William Payne and Edward Richardson Slee for the purchase of their right and interest in certain ground, buildings and premises, belonging to them, situate and being in Church Street, in the parish of St. Mary

Magdalen, Bermondsey, in the said county, and the sum of money to be paid by way of compensation, recompense and satisfaction for the loss, damage and injury which have accrued to such property in respect of improvements, *tenants' fixtures, machinery and otherwise, and for the future damages, as well temporary as perpetual, and also for all recurring damages done and sustained, and which may hereafter be done and sustained, to the said property, by reason of the said railway and the works thereof having been erected within fifty feet from the said property." The facts of the case were as follows.

The Company made their railway under the above statute, with an extension in width, authorised by stat. 3 & 4 Vict. c. cxxvii. (local and personal, public), which amended and enlarged the provisions of the former Act, but kept alive those referred to in the present case.

By stat. 3 & 4 Will. IV. c. xlvi., s. 4, the Company are empowered to enter upon the lands, tenements and hereditaments of any person according to the provisions and restrictions of that Act, and to set out and appropriate such parts thereof as they are by this Act empowered to take or use, for the purposes of the Act; and to execute various works, which are specified, doing as little damage as may be &c., and making recompense or satisfaction in manner after mentioned to all persons interested in any lands, tenements or hereditaments which shall be taken, used or injured, for all damages to be by them sustained, in or by the execution of all or any of the powers thereby granted.

Sect. 36 provides and enacts that nothing in the statute contained shall authorise the Company to take, injure or damage, for the purposes of this Act, any house or building or other property of certain descriptions (including the kinds of property which were the subject of this rule) without the consent in writing of the owner, occupier or other person interested, except such as are specified in the schedule annexed to this Act.

Sect. 45 (1) enacts "That if any corporation or other party by this Act authorised to sell and convey any lands, tenements or hereditaments, shall be applied to by or on behalf of the said Company to treat for, sell, dispose of or convey any part of any house, warehouse, building or manufactory in the actual occupation of one person, or of several persons jointly, and shall by notice in

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writing" &c. "signify his inclination or desire to treat for, sell, dispose of and convey the whole of such house, warehouse," &c., "and if it shall happen that the said Company shall not think proper or be willing to purchase the whole of such house, warehouse," &c., "then and in every such case nothing in this Act contained shall extend or be construed to extend to compel such corporation or party interested therein to treat for, sell, dispose of or convey, or to authorise the said Company to take or use part only or less than the whole of such house, warehouse," &c., "any thing herein contained to the contrary thereof in anywise notwithstanding."

Sect. 46 (1) recites that certain persons therein named are owners or lessees of buildings and other property through which the railway is intended to pass, or which may be required for the purposes of the Act, and that it may be extremely injurious to such owners &c., if the Company were not compelled to purchase the whole of any of such properties through which &c., or which may be required &c., if required by the respective owners &c. so to do: it therefore enacts that, if such persons or any of them shall be applied to by the Company to treat for, sell, &c., for the purposes of the Act, any part of any property now respectively belonging to them, any or either of them, as such owners or lessees, and shall give *notice to the Company of his or their desire to treat for, sell, &c., the whole of such property, and the Company shall not be willing to purchase the whole, nothing in this Act contained shall extend &c. to compel the said persons, any or either of them, to treat for, sell, &c., or to authorise the said Company to take or use, part only, or less than the whole, of such property.

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Sect. 47 enacts "That in case the owner lessee or occupier or other person interested in any house, manufactory, ground or building within the said parishes of St. Mary Magdalen, Bermondsey, and St. Paul, Deptford, or either of them, which shall be situate within fifty feet of such railway, shall by notice in writing, to be left at the office of the said Company, require the said Company to purchase his right and interest in such houses, manufactories, ground or building, it shall be lawful for the said Company, and they are hereby required, within thirty days after the service of such notice, to treat for the purchase of his interest in the houses, manufactories, ground and buildings mentioned in

(1) See now Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), ss. 18 and 92.—A. C.

such notice, and for the compensation recompense or satisfaction to be made to him for any loss damage or injury in respect of any improvements, tenants' fixtures, machinery or otherwise; and in case the party so giving such notice and the said Company shall not agree as to the amount or value of the satisfaction recompense or compensation to be paid for the value of such houses, manufactories, ground and buildings, improvements, tenants' fixtures, machinery or otherwise, then the amount or value of such satisfaction recompense or compensation shall be ascertained and settled by the verdict of a jury, in the manner hereinbefore directed for ascertaining and settling the value or recompense *for other lands" &c. "to be taken or purchased for the purposes of this Act" (1).

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The affidavits in support of the rule stated that Messrs. Noah Slee. Payne and E. R. Slee were lessee and assignees, for an unexpired term, of certain hereditaments and premises, comprising a piece of ground situate on the west side of Church Street, Bermondsey, containing in the front, next Church Street, 226 feet, on the south side 162 feet, in the rear 260 feet, and on the north side 177 feet, together with six dwelling-houses (one principal and five small ones), then in the several tenures or occupations of the said Noah Slee and of John Orton &c. (naming others), "and the

(1) The full directions as to this proceeding are given in sect. 50. The following sections were also referred to during the argument.

Sect. 61 enacts "That any person being tenant for years, from year to year or at will, or occupier of all or any part of the messuages, shops, cellars, buildings, land, garden, ground and other hereditaments mentioned in the schedule to this Act, or which the said Company may require for the purposes of this Act, who shall or may sustain or be put unto any loss damage, or injury in respect of any interest whatsoever for improvements, tenants' fixtures, machinery, or in any other manner howsoever, by or by reason of the passing of this Act, shall and may have, accept, and receive all and every such benefit and advantage by way of satisfaction recompense or compensation from the said Company for every or any such loss damage or injury as aforesaid, as shall be agreed upon between them respectively and the

said Company; and in case such tenant for years," &c., "occupier or party interested in such tenements and hereditaments, improvements, fixtures, machinery or otherwise, and the said Company shall not agree as to the amount or value of such satisfaction recompense or compensation, then the same respectively shall be ascertained and settled by the verdict of a jury in manner" &c.

Sect. 64 enacts "That if at any time hereafter any person shall sustain any damage in his lands, tenements, hereditaments or property, by reason of the execution of any of the powers hereby given and for which no remedy is hereinbefore provided, then and in every such case the recompense or satisfaction for such damages shall from time to time be settled and ascertained in such manner as is hereinbefore directed in respect to any other recompense or satisfaction hereinbefore mentioned."

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brewery, *manufactories, warehouses, sheds, stables, coach houses, cooperages, stoves, vaults and buildings on the said piece or parcel of ground erected and built, in the occupation of the deponents" (N. Slee, Payne and E. R. Slee), "and used as a vinegar manufactory." The principal dwelling-house was occupied by Noah Slee. A surveyor deposed "that the said principal dwelling-house is situated at the north-east corner of the said piece or parcel of ground, which said piece or parcel of ground is, at the north-eastern extremity thereof, within twenty-five feet of the line of the southern boundary of the said London and Greenwich Railway; and that, if a straight line were drawn parallel with such southern boundary at a distance of fifty feet therefrom, such line would intersect and comprise twenty-nine feet six inches of the said dwelling-house on the east side thereof abutting on Church Street aforesaid, and about thirty-seven feet on the north side thereof, five feet on the west side thereof, and about forty-eight feet on the south-western side thereof: which said several last mentioned dimensions would include nearly one half of the said principal dwelling-house." And "that the north-east corner of the garden, being a portion of the hereinbefore mentioned piece or parcel of ground, together with the greenhouse erected on the said garden and appurtenant to the said principal dwelling-house, are situate within twenty-four feet eight inches of the southern boundary of the said railway; and that, if a straight line were drawn parallel with such southern boundary, at a distance of fifty feet therefrom, such line would intersect and comprise on the east side of the said garden thirty feet, on the north side " forty-three feet, and on the south-western side about fifty-two feet.

[172] The affidavits contained some statements (which were contested in the affidavits on behalf of the Company) showing that the approach of the railway had made the occupation of the said dwelling-house and garden inconvenient, and lessened their value. All the premises were comprehended in the schedule of stat. 3 & 4 Will. IV. c. xlv., and the lessees, when the Act passed, were among those named in sect. 46.

Messrs. Slee, Payne and Slee gave notice to the Company to purchase their right and interest in the said piece of ground, buildings and premises, and to treat for the compensation to be made for loss, damage and injury in respect of improvements, tenants' fixtures, machinery and otherwise. The Company offered, without prejudice, to treat for Mr. N. Slee's dwelling-house, and the

whole of the yard and garden at the rear of that house, and for the compensation &c. to be made for improvements, tenants' fixtures, machinery or otherwise: but they declined to treat for the ground except as aforesaid, or for any of the dwelling-houses &c. (the other premises mentioned in the notice), which were not situate within fifty feet &c. Messrs. Slee, Payne and Slee, then gave notice to the Company to issue their warrant to the sheriff for summoning a jury; which not being done, they made the present motion.

The affidavits in answer referred to a plan, showing that the premises used as a vinegar manufactory, the five smaller dwelling-houses, more than one half of the house occupied by Mr. N. Slee, and the greater part of the garden occupied therewith, were more than fifty feet distant from the railway.

Sir W. W. Follett, Solicitor-General, and *W. J. Alexander* now showed cause:

The premises which the *Company are required to take consist of several distinct parcels; a manufactory, several dwelling-houses, and a garden. One dwelling-house only, and part of the garden, are within fifty feet of the railway. The dwelling-house, indeed, is indivisible: that the Company should take that and part of the garden (which, however, they propose to take entirely), may be reasonable; but they cannot be bound to take the other premises, merely because they are part of the same estate. If these premises are within the provisions of sect. 46, the Company might be obliged to treat for the whole if they proposed to take any part; but they do not require any part. The question arises wholly on sect. 47. The words there used are disjunctive, and the remedy given to the owner, &c., of "any house, manufactory, ground or building" "which," that is, which house, or which manufactory, &c., "shall be situate within fifty feet of such railway." There is no reason here for considering the several parcels otherwise than as if they belonged to different proprietors.

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Thesiger, Erle and Wordsworth, contra :

Here is a property appropriated to one entire purpose: it cannot be contended that the vinegar manufactory is strictly the building in which the manufacture is carried on, and that all the other buildings and houses, and even the land adjoining, and over which access is had to the manufactory, must be the subject of a distinct consideration. If the statute does not oblige the Company to

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take all, it is difficult to draw any limit. That which affects the usefulness of a part affects the whole.

(PATTESON, J.: Your argument puts the Company in the same situation under sect. 47 as in cases *within sect. 46; yet the words of the two are very different.)

Their effect is the same, in a case like this. If the Company had wished to guard themselves against applications like the present, they should have had a clause inserted in their Act like sect. 51 of the Blackwall Railway Act, 6 & 7 Will. IV. c. cxiii. (local and personal, public), which provides "that in no case shall the said Company be compellable to purchase any portion of any dwelling-house or shop, which portion is situate at a greater distance than fifty feet from the said railway." Here no such express provision is made; and to divide a property which is entire, in the manner contended for on the other side, might lead to the most unjust and absurd consequences.

(PATTESON, J.: Parties whose property is deteriorated in any manner may recover compensation under sect. 61 or sect. 64: and then no absurd consequence need arise.)

Proprietors are entitled to insist on the remedy given by sect. 47, even if their property be not deteriorated. Clauses of this kind are to be liberally interpreted; and the Court will give an enlarged construction to the term "manufactory" in sect. 47, as they did in *Lister v. Lobley* (1) to the word "owners," and as the Court of Exchequer did, in *Bell v. Hull and Selby Railway Company* (2), to the word "injured."

LORD DENMAN, Ch. J. :

By this application Messrs. Slee require that the Railway Company should take, not only the dwelling-house and garden, parts of which are within fifty feet of the railway, but also other premises forming a vinegar manufactory, and five dwelling-houses *with their gardens; that is, the whole of Messrs. Slee's property at the place in question. It is difficult to suppose that the application was not made in the first instance under a supposition that it came within sect. 46, which requires, in the case of certain properties, that, if the Company desire to take any part, the owner shall not be compellable to treat

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or sell unless they will take the whole : but that clause does not operate here, as the Company do not want any part of the property. The case comes within sect. 47, which enacts that the Company, on notice from the owner of any house, manufactory, ground or building situate within fifty feet of such railway, shall treat for the purchase of his interest, in what? Not the whole property, as under the preceding clause, but in "the houses, manufactories, ground and buildings mentioned in such notice." The obligation to purchase the whole property is left out, where the Company do not apply for any part. Here Messrs. Slee make their claim, and the Company are willing to purchase according to sect. 47. The Act cannot mean that, if a house and garden are within fifty feet of the railway, the Company shall be obliged to purchase all the rest of the property in that place belonging to the same person.

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PATTERSON, J. :

Sect. 45 protects persons in general from being obliged to sell less than the whole of any house, warehouse, building or manufactory in actual occupation, when the Company apply to purchase. Sect. 46 is confined to certain owners of properties who are there named, and provides that those persons, if the Company call upon them to sell part, shall not be obliged to treat or sell unless the Company will take "the *whole of such property." That case does not arise here. The question turns upon sect. 47, which is general, like sect. 45, and must be considered as if sect. 46 were not in the Act. Now, by sect. 45, if the Company wish to take part of a house, and the proprietor requires them to take the whole, they must treat for the whole or none : that is the only effect of the clause. The owner may refuse if they will not treat for the whole ; that is, not the whole property, as under sect. 46, but the whole of the particular house. Here it is argued, under sect. 47, that, if the railway comes within fifty feet of any premises, the Company may be required to take all the property which the owner occupies close by (though they require none), because it is all under one occupation : whereas, if they had even wanted to buy a part, the owner could not have compelled them to take the whole property, the case not being within sect. 46. The parties ought to be content with what the Company has offered.

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WILLIAMS, J. :

I am of the same opinion. The only ground of this application

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seems to be that the dwelling-house and manufactory are held under one lease. It is not suggested that the taking of one will interfere with the other. The Company have offered more than was necessary.

WIGHTMAN, J.:

If the rule were made absolute, sect. 47 would have as large an effect as sect. 46: but the two sections are different both in their words and in their objects.

Rule discharged.

1842.
May 4.

ANDREWS v. TURNER.

(3 Q. B. 177—179.)

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A will of lands made before January 1st, 1838, and revoked, may, under the Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), sects. 9 and 34, be republished after that day by a codicil attested by only two witnesses.

REPLEVIN. Avowry by defendant, as landlord, for rent in arrear. Plea, *Non tenuit*. Issue thereon. The cause was tried before Atcherley, Serjt. at the last Suffolk Assizes. The party who was substantially plaintiff claimed the land as devisee, under a will executed on 9th April, 1834. One of the principal questions at the trial was, whether the will was duly executed so as to pass real estate, and, if not, or if it was revoked by a subsequent will, whether it was republished by a codicil, made 18th March, 1841. One of the attesting witnesses to the will of 1834 gave evidence of its having been duly executed; the other two gave evidence that it was not duly executed. It was conceded that the deviser had made a will in 1835; this was not produced. The codicil of 1841 was attested by two witnesses; and evidence was given of the execution. This codicil adopted the will of 1834, by referring to it in express terms. On the defendant's part it was said that the will of 1834, even if duly executed, had been revoked by that of 1835; and it was argued that the first will, if not duly executed, or if revoked, was not rendered effectual or revived by the codicil: first, because a will anterior to stat. 1 Vict. c. 26, could not be revived as to real estate by a codicil having the attestation of only two witnesses; secondly, because the codicil of 1841 was not annexed to the will, and had not been executed under such circumstances as to be a legal republication. The learned *Judge overruled all the objections. Verdict for plaintiff. In this Term (1),

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(1) April 18th. Before Lord Denman, Ch. J., Patteson, Williams, and Wightman, JJ.

Byles moved for a new trial on the ground of misdirection :

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It must be admitted that, where both will and codicil are subsequent to 1st January, 1838, the will is brought down to the date of the codicil, because sect. 34 of stat. 7 Will. IV. & 1 Vict. c. 26, enacts "That this Act shall not extend to any will made before the 1st day of January, 1838, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived." But it does not follow that a will of land, not duly executed before the statute took effect, can be set up by a codicil made afterwards and attested by only two witnesses.

(LORD DENMAN, Ch. J.: The Judicial Committee of the Privy Council has held, after great consideration, that the words which prevent the Act from extending to any will made before January 1st, 1838, do not apply where a will so made is republished by a codicil after that date; the republication being a new making of the will (1).)

Byles then argued, secondly, that the codicil was not so executed

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(1) *Brooke v. Kent*, 50 R. B. 59 (3 Moore P. C. 334), argued before Lord Brougham, Lord Denman, Sir J. B. Bosanquet, and Dr. Lushington: decided July 1st, 1841. In the judgment, delivered by Dr. LUSHINGTON, is the following passage.

"The question is, whether all wills and codicils made before that date are altogether, and for ever, out of the operation of the Act, or, if not wholly but in part, in what part, and for how long. Now it is clear that all wills and codicils made before the 1st of January, 1838, were not altogether, and for ever, out of the operation of the Act, and to be governed by the old law; for, if they were, they might be re-executed according to the old law, or republished according to the old law, or revived or altered by a codicil executed according to the old law: but this same thirty-fourth section provides for the contrary: for every will or codicil, though made before the 1st of January, if re-executed, repub-

lished, or revived by codicil, shall be deemed to bear date at the time it was so re-executed, republished, or revived by codicil. Now, if such re-execution, republication, or revival by codicil took place after the 1st of January, 1838, the whole instrument bears date at such time, and consequently is out of the exception, and within the Act. It seems obvious, therefore, that, in these three most important particulars, wills dated before the 1st of January, 1838, may come within the Act, if re-executed, republished, or revived by codicil subsequent to the 1st of January, 1838."

The principal question in the case related to obliterations and alterations made after the statute came into operation, in a will executed before: and the Judicial Committee held that these were not valid unless executed according to the statute, sect. 21.

The reporters are indebted to Mr. Moore for the above extract.

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as to be a republication. On this point also the Court intimated that he was not entitled to a rule. He then moved, thirdly, on the ground that the verdict was against the evidence.

The Court, on this point, took time to speak to the learned Judge: and on a subsequent day of the Term (May 4th),

LORD DENMAN, Ch. J. gave judgment that there should be

No rule.

1842.
May 28.

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REG. v. THE INHABITANTS OF THE PARISH OF ST. MARTIN'S IN THE FIELDS (1).

(3 Q. B. 204—214; S. C. 11 L. J. M. C. 112; 2 G. & D. 426; 6 Jur. 850.)

The Proprietors of Drury Lane Theatre demised, for a term of years, at a nominal rent, a private box, with the power of exclusively occupying it upon the nights on which there should be performances. The Proprietors had also access to the box, but not the right of occupying it during the performance: and they were entitled and bound to perform the repairs upon it.

Held that the lessee was rateable to the poor for the occupation of the box, under a local Act (10 Geo. III. c. 75) which authorized the making rates on all persons who should inhabit, hold, occupy, possess or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement, or hereditament.

Although the Company of Proprietors were rated for the theatre generally.

On appeal by Angela Burdett Coutts against a poor rate (2) for the parish of St. Martin in the Fields, the Sessions ordered the rate to be amended by striking *out the appellant's name, subject to the opinion of this Court upon the following case.

By the rate in question, the proprietors of the Theatre Royal, Drury Lane, were assessed as follows: The Theatre Royal Drury Lane Company, for the Theatre Royal, 1,800*l.* And the appellant as follows: Angela Burdett Coutts, for box, 100*l.*

The box in question is in the parish of St. Martin in the Fields; and the rate was duly made, allowed and published, pursuant to a local Act of Parliament, 10 Geo. III. c. 75 (3).

(1) Cited in *Spear v. Bodmin Union* (1880) 49 L. J. M. C. 72.—A. C.

(2) The assessment was contained in several columns: the material entries, and the heads under which they appeared, were: "Name of occupier, Angela Burdett Coutts." "Description of property &c., Box in Theatre Royal." "Name or situation of pro-

perty, Little Russell Street." "Gross estimated rental, 120*l.*" "Rateable value, 100*l.*" "Rate, at 4*d.* in the pound, 1*l.* 13*s.* 4*d.*"

(3) "For building a workhouse in the parish of St. Martin in the Fields, within the liberty of Westminster in the county of Middlesex."

Sect. 13 enacts "That the church-

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By indenture of 21st February, 1795, Richard Brinsley Sheridan and Thomas Linley, Proprietors of the New *Theatre Royal, Drury Lane, in consideration of 6,000*l.* paid by the late Thomas Coutts, Esq., did grant, bargain, sell and demise, for the term of 100 years, at a peppercorn rent, unto him, the said Thomas Coutts, his executors, &c., all that box marked &c., on the south side or Prince's side of the New Theatre Royal, Drury Lane, in the county of Middlesex, being directly and immediately under the box called the stage box &c. (the dimensions were then stated), and also all that vacant space or passage containing eight feet four inches or thereabouts, lying immediately between the back part of the same box thereby demised and the wall of the said theatre, the said vacant space, so lying behind the said box, to be made and converted into a room, and fitted up and finished by and at the expense of the said R. B. S. and T. L., their executors, &c., for the sole and exclusive use of the said T. Coutts, his executors, &c., as therein-after mentioned and expressed; and also full and free liberty of ingress, &c. (The case then stated the particulars of the privilege granted: which it is unnecessary to set forth here, as the case turned entirely on the subsequent lease.)

The said indenture having been duly executed, the said T. Coutts took possession of, and occupied and enjoyed, the said box, and was possessed thereof, pursuant to the terms, conditions and covenants of the said indenture, until 1809, when the said New Theatre Royal, Drury Lane, was destroyed by fire.

In the year 1812, a new theatre was erected, under the powers

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wardens, overseers of the poor, vestrymen, constables, and other ancient inhabitants of the said parish, are hereby authorized and required to assemble and meet together in the vestry room of the said parish twice or oftener in every year (if occasion shall require), due notice having been given in the parish church on the preceding Sunday before such meeting; and they, or the major part of them so assembled, shall make one or more rate or rates, assessment or assessments, for and towards the relief of the poor, and for the several purposes of this Act, upon all and every person or persons who do or shall inhabit, hold, occupy, possess, or enjoy any land house, shop, wharf, warehouse,

or any other building, tenement, or hereditament, or any other person or persons who by law is or are chargeable and assessable for and towards the relief of the poor, as the said churchwardens, overseers of the poor, vestrymen, constables, and other ancient inhabitants of the said parish, or the major part of them, at such meeting or meetings, shall think proper to be rated and assessed; which said rates or assessments so to be made shall be allowed by two of his Majesty's justices of the peace for the city and liberty of Westminster, and notice thereof shall be given in the parish church the Sunday next after the same shall have been so allowed."

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of two Acts (1) of the 50 and 52 Geo. III., by *which the proprietors of the theatre were incorporated. And, on 27th August, 1812, an indenture was executed, between the committee of the Theatre Royal Drury Lane Company of Proprietors, and the said T. Coutts, by which, after reciting the destruction and the re-erection of the theatre under the provisions of the said Acts, and the power of the said committee to grant leases of any boxes in the new theatre in the nature of private boxes, with an exclusive right of admission to such boxes on every night of theatrical performance, and reciting the claims of the said T. Coutts to a private box in the said new theatre, and the agreement of the committee that, in lieu and compensation of all claims in respect of such former box so purchased by the said T. Coutts, and in consideration of 3,000*l.* to be paid by the said T. Coutts, a private box should be granted and demised to him, his executors, &c., it was witnessed that, in pursuance of the said agreement, and in consideration of the premises, and of 3,000*l.* to the said committee paid by the said T. Coutts, the said committee, in pursuance of the powers to them given by the said Acts of Parliament, and of all other powers enabling them in that behalf, did bargain, sell, demise and lease to the said T. Coutts, his executors, &c., all that newly erected whole and entire box in the said newly erected Theatre Royal, Drury Lane, situate and being on the ground tier, &c., and also the lobby, and the small room adjoining to and communicating therewith, situate behind the said newly erected private box, and the free and exclusive use and enjoyment thereof, and of every part thereof, respectively, together with the full and free *liberty of ingress, egress, regress, way and passage, into and from the said theatre, and to and from the said box and room, every evening and night upon which any public entertainment, whether theatrical or musical, should be exhibited in the said theatre, to and for the said T. Coutts, his executors, &c., or for any number of persons by his or their order or authority, not exceeding in any one night or time of performance the number of eight, and who should respectively be entitled to admission thereto upon producing to the door keeper, at the private box door of the said theatre, a ticket belonging to such box, or a note or order in writing under the hand of the said T. Coutts, his

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(1) Stat. 50 Geo. III. c. ccciv., local and personal, public: "For rebuilding the late Theatre Royal Drury Lane, upon the conditions, and under the regulations therein mentioned." Stat.

52 Geo. III. c. xix., local and personal, public: "For altering and enlarging the powers of an Act of his present Majesty, for rebuilding the late Theatre Royal Drury Lane."

executors, &c., for his, her or their admission, respectively ; and also all rights, &c. (1) ; excepting and always reserving out of this demise unto the said Company of Proprietors, their successors and assigns, free liberty, at all times, to paint, decorate, and make such alterations in, the front of the said private box, for the purpose of making the same uniform and like the fronts of the other private boxes in the said theatre, as the committee of management for the time being of the said Company of Proprietors should from time to time think proper ; and excepting always, and subject to, such regulations, from time to time to be made by such committee for the time being, as should be made by them respecting other private boxes in the said theatre : but so as such regulations did not prevent or hinder the said T. Coutts, his executors, &c., from enjoying the exclusive liberty and use of the said private box and room, with all rights and privileges thereto belonging or appertaining, in the manner thereby intended and expressed to be *granted and demised. To hold the same (except as before excepted) unto the said T. Coutts, his executors, &c., from the 1st of October then next for eighty-two years and one quarter, to commence from 29th September then next ; yielding and paying the yearly rent of 1*d.* This indenture also contained covenants for quiet enjoyment : and, by the lessors, at their own expense, during the said term, to preserve the said box and room thereby demised for the sole and exclusive use and accommodation of the said T. Coutts, his executors, &c., and such other persons as thereinbefore named, and repair, ornament and finish the same in the same manner as the private boxes and rooms adjoining thereto : and, in case of destruction by fire of the said new theatre, or any other theatre to be erected on the site thereof, or that it should be necessary to make any alterations in the same which should interfere with the full and free use and enjoyment of the said box, room and premises, then, upon the re-edification of such theatre, and in the meantime and during the progress thereof, a box and retiring room, with all proper conveniences, in the said theatre, or such new erected theatre, and also a box with such accommodations as it should be in the power of the said Company to provide in such other theatre as during the erection thereof should be opened for public performances, should be appropriated for the exclusive use of the said T. Coutts, his executors, &c., in lieu of the said box, room and premises thereby demised, and be held by him and them under the same privileges as were granted

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(1) So in the case.

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in respect of the said demised box, room and premises. There was also a covenant from the said T. Coutts, his executors, &c., not to line or hang the front of the said box, or do any thing to interfere with the uniformity of the said theatre.

After the execution of the said last mentioned indenture, the said T. Coutts took possession of the last mentioned box, room and premises, and, according to the terms, &c., of that indenture, the said T. Coutts, during his life, had the use and enjoyment thereof : and the appellant, at the time of the making of the rate, had, and now has, the use and enjoyment thereof according to the provisoes, terms, &c., of the said indenture.

The said box and room are placed upon a level with the stage, and form a component part of the theatre, which is in the occupation, and under the management, of parties to whom it is let by the Company of Proprietors. The occupiers and managers have access to the said box and room from the other parts of the building, by internal doors, of which they keep the keys. The approach to the box and room from the street is by an outer door, which opens to a staircase, by which staircase persons going to other private boxes in the theatre (some of which are let nightly by the occupiers and managers of the theatre) ascend to those boxes. The outer door next to the street, and also the staircase, are under the controul of the occupiers and managers of the theatre : and the door is closed and fastened by them at all times, except during the hours of performance.

The theatre has been opened for public entertainments, either theatrical or musical, for about two hundred evenings in the year. The performances usually continue from seven o'clock in the evening until twelve at night.

The question for the opinion of this Court was, whether the appellant was liable by law to be assessed to the said rate in respect of the said box. If the Court should be of opinion that she was, the order of Sessions was to be quashed : if otherwise, to be affirmed.

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The case was argued in last Term (1).

Clarkson and Bodkin, in support of the order of Sessions :

The appellant was not liable to be rated for any part of the theatre. The Proprietors are in possession of the whole. In

(1) April 27th. Before Lord Denman, Ch. J., Patteson, Williams and Wightman, JJ.

1 Nol. P. L. 176 (1) it is said that “no lodger, though possessing the principal part of the house, was ever rated; but the owner, how small soever the part reserved for himself, is in the eye of the law the tenant for the whole, and is rated as the occupier.” This is cited from the judgment of BULLER, J. in *Rex v. Eyles* (2); and *Rex v. Watson* (3) is also referred to. The passage in Nolan is assented to by LITLEDALE, J. in *Rex v. Ditchet* (4), where it was held that, under stat. 6 Geo. IV. c. 57, s. 2, a party who lets a part of his house to a lodger may gain a settlement as occupier of the whole. The box could not be called the dwelling-house of the appellant if it were broken and entered with intent to steal. The trustees of a Methodist chapel, and not the renters of the pews, were held rateable in *Rex v. Agar* (5). The renter of a stall in the bazaar in Soho Square would surely not be rateable. Indeed, if the appellant be rateable, a party who hires a stall in the Opera House, or who occupies a place in the theatre for a single night’s performance, would be rateable; or the counsel who occupies exclusively the Tub in the Court of Exchequer: for there is no principle upon which a distinction can be introduced as to time. Occupiers of part of a house would not be entitled to vote for members of Parliament, *as occupiers, except for the special clause in the Reform Act, stat. 2 & 3 Will. IV. c. 45, s. 29.

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(PATTESON, J. referred to *Rex v. Brown* (6) and *Rex v. Bell* (7).)

Those cases appear to show that, if there be a distinct subject of occupation, the occupier of that may be rated separately from the owner who is the general occupier; as in the case of a dairy farm or a waggon way. But where that is not so the owner is rateable for all, as in the case of the General Cemetery Company, *Regina v. St. Mary Abbots, Kensington* (8). And here, in fact, the Proprietors are rated for the theatre generally. One party may be rateable for the surface of the soil, another for the occupation of part under the surface by pipes, &c.; *Rex v. The Chelsea Water Works Company* (9): but both parties could not be rated for the same part. It is observable that, in this case, not only the appellant does not repair, but the Proprietors reserve the right to do so.

(1) Ed. 4.

(2) Cald. 407, 414.

(3) 5 East, 480.

(4) 9 B. & C. 176, 184.

(5) 14 East, 256.

(6) 8 East, 528.

(7) 7 T. R. 598.

(8) 54 R. R. 705 (12 Ad. & EL 824).

(9) 39 R. R. 438 (5 B. & Ad. 156).

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Sir W. W. Follett, Solicitor-General, and Chambers, contra :

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The question is not as to the rateability under the general law of stat. 43 Eliz. c. 2, s. 1, but as to the effect of the words, in stat. 10 Geo. III. c. 75, s. 13, "inhabit, hold, occupy, possess, or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement, or hereditament." The appellant here enjoys a tenement, taking the word as it must be understood from the context (1). It is urged that the Company of Proprietors is already rated for this tenement. Probably, *however, the value of the theatre in their hands has been estimated with a deduction for the value of the box, which, properly speaking, is not their's. It is true, as pointed out, that the Proprietors reserve the right of repairing: that, however, is not an uncommon proviso in cases where a whole house is let, and where it could not be suggested that any but the lessee was the occupier. *Rex v. Morgan* (2) shows that it cannot always be assumed that a landlord occupies where a tenant does not. It is asked whether a party could be rated for a stall at the Opera House: but in *Rex v. Caversham* (3) the Court seemed to think that even a settlement might be gained, under stat. 13 & 14 Car. II. c. 12, s. 1, by occupying a stall in a market on the market days.

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Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (May 28th), delivered the judgment of the Court:

The question in this case is, whether Miss Burdett Coutts is liable to be rated under an Act, 10 Geo. III. c. 75, in respect of a private box at the Theatre Royal, Drury Lane.

This box was demised to the late Mr. Coutts, under an Act for rebuilding the theatre, for a long term of years. The lease grants an exclusive right to occupy the box and a small room adjoining, whenever any performances take place, and a private entrance to the same in common with other private boxes.

The words of stat. 10 Geo. III. c. 75, s. 13, are, that the persons there mentioned "shall make one or more rate or rates, assessment or assessments, for and towards the *relief of the poor, and

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(1) See *Rex v. The Manchester and Salford Waterworks Company*, 1 B. & C. 630; *Rex v. Mosley*, 26 R. R. 328 (2 B. & C. 226); *Rex v. The Trustees for paving Shrewsbury*, 37 R. R. 409 (3 B. & Ad. 216); *Colebrooke v. Tickell*,

43 R. R. 520 (4 Ad. & El. 916); *Rex v. Barker*, 45 R. R. 502 (6 Ad. & El. 388).

(2) Note (a) to *Rex v. Greame*, 2 Ad. & El. 618.

(3) 4 B. & C. 683.

for the several purposes of this Act, upon all and every person or persons who do or shall inhabit, hold, occupy, possess, or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement, or hereditament."

We are of opinion that the box in question is a tenement within the meaning of this Act, and that it is held and occupied by the appellant so as to make her liable to be rated. The words are too large to admit of any other construction; and none of the cases referred to at the Bar lead to any different conclusion.

It is argued that the Proprietors are rated for the whole theatre, and that, if the appellant be also rated, the same premises will in effect be rated twice over. But this consequence by no means follows. The Proprietors are rated in respect of their general possession of the theatre, of which the box in question forms a very small part, the rent being only 1*d.* per annum, and may fairly be considered as not taken into account in rating the Proprietors; whereas the appellant is rated in respect of this particular box. If, however, the consequence did follow, it would show only that the Proprietors were rated too highly, not that the appellant is not liable at all, which is the question submitted to us.

The order of Sessions must therefore be quashed.

Order of Sessions quashed.

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REG. v. THE INHABITANTS OF TIPTON (1).

(3 Q. B. 215—222; S. C. 11 L. J. M. C. 89; 2 G. & D. 92; 6 Jur. 760.)

A pauper was born a bastard in the workhouse of the parish of H., where her mother was then maintained as a pauper belonging to H. H. consisted of several townships, maintaining their poor jointly: the workhouse was in one of these; and pauper's mother was settled in H., in respect of a part of H. which was in another township. After the pauper's birth, separate parish officers, under the Poor Relief Act, 1662 (13 & 14 Car. II. c. 12), s. 21, were appointed for each of the townships, and thenceforward they maintained their poor separately.

Held that, both under and independently of the Poor Relief Act, 1814 (54 Geo. III. c. 170), s. 3, the pauper, at her birth, was settled in the parish of H., but not in any particular township: and that she had not, after the separation of the townships, a settlement in the township in which the workhouse was.

On appeal against an order of two justices, removing Elizabeth Shaw from the parish of Tipton in Staffordshire to the township of

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(1) Followed in *Stourbridge Union v. Union v. St. Saviour's Union* [1898] 1 Q. B. 594, 67 L. J. Q. B. 408, 78 L. T. 769, 40 L. J. M. C. 186; and *Dorking* 29.—A. C.

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the borough of Hales Owen in Shropshire, the Sessions quashed the order, subject to the opinion of this Court upon the following case.

The parish of Hales Owen, at the time of the birth of the pauper, which took place about twenty years ago, in the workhouse situate in the town of Hales Owen in Shropshire, consisted of the appellant township of Hales Owen, the township of Oldbury, and ten other townships in Shropshire, and three other townships in Worcestershire. The three Worcestershire townships had always separate overseers, and supported their poor, and managed their parochial affairs apart from each other, and also apart from the rest of the parish; but the other part of the parish of Hales Owen, which is in Shropshire, and which includes the appellant township of Hales Owen, the township of Oldbury, and the other ten townships in Shropshire, formed a distinct parish, from time immemorial up to the year 1832, and never had but one set of overseers, who were annually appointed overseers of the poor of the parish of Hales Owen in Shropshire, and who, with the churchwardens, made a joint rate which formed one common fund for the relief of the poor and other parochial disbursements, and of which a joint account was kept and audited in the usual way.

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In 1832, an application was made to the justices of Shropshire to appoint overseers of the township of Oldbury; and, upon their refusing, the inhabitants of Oldbury applied to the Court of King's Bench, and obtained a rule for a *mandamus* to compel such appointment; which rule, after argument, was made absolute (1): and the justices accordingly appointed separate overseers of the poor of the township of Oldbury, and each of the other Shropshire townships, and from that time ceased to appoint overseers of the poor for the parish of Hales Owen.

The pauper Elizabeth Shaw was born a bastard in the workhouse, which was situate within the appellant township, about ten years before the division of the parish of Hales Owen in 1832: which workhouse was then, and always previously had been, used for the reception and accommodation and maintenance of the poor of the whole of the said parish of Hales Owen in Shropshire, then consisting of all the said townships: but the pauper's mother, at the time of the birth of the pauper Elizabeth Shaw, was legally settled in that part of the parish of Hales Owen which subsequently became, and now forms, the distinct township of Oldbury; and, at

(1) *Rex v. The Justices of Salop*, 3 B. & Ad. 910.

the time of the pauper's birth, she was maintained in the said workhouse as a pauper of the parish of Hales Owen.

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The question for the opinion of the Court was, whether, upon the foregoing facts, the pauper Elizabeth Shaw was settled in the township of Hales Owen in Shropshire, by reason of her having been born in the said workhouse under the circumstances before stated. If so, the judgment of the Sessions was to be quashed, and the order of removal affirmed; if not, the judgment of the Sessions to be affirmed.

The case was argued last Term (1).

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Corbet, in support of the order of Sessions. * * *

F. V. Lee, contra. * * *

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Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (May 28th), delivered the judgment of the Court:

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The question in this case arises upon the removal, by order of two justices, of a pauper, Elizabeth Shaw, from the parish of Tipton to the township of the borough of Hales Owen, in the county of Salop. The Sessions quashed the said order, and stated a case for the opinion of the Court of Queen's Bench, which is in substance as follows.

Previously and up to the year 1832, the parish of Hales Owen consisted of fifteen townships, twelve of which are in the county of Shropshire and three in the county of Worcester. The three latter were always independent of the other twelve townships, and of each other, for the purposes of maintaining their poor. The former twelve "from time immemorial" (until the year 1832) constituted one parish, having one set of overseers, and maintained their poor as such parish.

In the said year 1832, by virtue of a writ of *mandamus* *(on the application of one of the said twelve townships, Oldbury), the said parish of Hales Owen became divided; and all the said twelve townships in the county of Shropshire have since maintained their poor apart, have had separate overseers, and none have since been appointed for the parish of Hales Owen. About ten years before such subdivision, the pauper was born a bastard in the parish

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(1) April 23rd, 1842. Before Lord Denman, Ch. J., Patteson, Williams, and Wightman, JJ.

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workhouse in the township of the borough of Hales Owen. And the question is, whether she gained a settlement in the latter township by such birth. And that must depend upon this: how far, before such subdivision, each township ought to be considered as connected with, or independent of, the parish for purposes of settlement. Generally speaking, they are not so connected: any act, by which a settlement may be gained, has no reference to the township in which it may be acquired, but to the parish only. Whether that settlement was gained in the township of the borough of Hales Owen, or Oldbury, or any other of the twelve townships constituting the parish of Hales Owen, was, before the separation, wholly immaterial. It was not a settlement gained in township A. or B., but in the district where alone it could be gained, the parish.

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This point has been, to a certain extent, under the consideration of the Court in respect of this same parish and townships, in the case of *Rex v. Oldbury* (1). There was an order of removal into the township, Oldbury; and, in support of it, a former order was produced, removing the pauper into the parish of Hales Owen, against which there had been no appeal. Such latter *order was relied upon as conclusive against the township of Oldbury, and was held so to be by the Court of Quarter Sessions. This Court, however, decided, with some hesitation, that it was not; which decision could only have been upon the ground that a settlement in the parish is not a settlement in the whole and also in every part or township in it. Because, if it had been, the Sessions were unquestionably right. For if, as was then contended, the proof of a settlement there given applied to the parish and to every township, equally and to the same extent, the order of removal unappealed against would have been conclusive, and all evidence against it inadmissible.

The decision in the case of *Rex v. Oakmere* (2), cited in the argument, was to this effect: that the birth of a pauper in the forest of Delamere, whilst extraparochial, gained no settlement in the township of Oakmere, which was constituted such township by Act of Parliament long after; or, in other words, that the state of things at the time of the birth was to be considered; and then no settlement could, of course, be gained. So here, by stat. 54 Geo. III. c. 170, s. 3, the settlement of the pauper, at her birth, was in the parish of Hales Owen, that being "the district," "on whose

(1) 4 Ad. & El. 167.

(2) 5 B. & Ald. 775.

account" the pauper's mother "was received and maintained" in the workhouse. The locality therefore of the township of the borough of Hales Owen is excluded; and all the townships contributing to the workhouse stand on the same footing. Indeed, independently of the statute, the settlement by birth would have been in the parish.

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That being so, to sustain the order of removal into the township of Hales Owen, we must hold that a settlement by birth was gained equally in the parish and each of the twelve townships composing it; for which we can find no warrant of direct authority, or analogy in the law of settlement.

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It has been suggested, as a difficulty, that, unless we so hold, the parish by subdivision will get rid of settlements, and that persons, who would otherwise have gained them, may have none. A similar result happened under circumstances nearly the converse of the present, in the case of *Rex v. Saighton on the Hill* (1). There the pauper had gained a settlement in Saighton on the Hill, and afterwards in Gloverstone, then a township: afterwards, by a certain alteration in the castle of Chester, all the houses in Gloverstone were pulled down; and it ceased to exist as a township. The removal was accordingly into Saighton on the Hill, as the last practicable place of settlement. The Court, however, decided that the settlement in Saighton on the Hill was extinguished by that in Gloverstone, though the necessary effect of the decision was to leave the pauper without any settlement at all.

Upon the whole, we are of opinion that the decision of the Sessions was right, and that their order must be confirmed.

Order of Sessions confirmed.

REG. v. THE BIRMINGHAM AND GLOUCESTER RAILWAY COMPANY (2).

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(3 Q. B. 223—234; S. C. 11 L. J. M. C. 134; 2 G. & D. 236; 3 Ry. Cas. 148; 6 Jur. 804.)

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A corporation aggregate may be indicted by their corporate name for disobedience to an order of justices requiring such corporation to execute works pursuant to a statute. And, if such indictment be preferred at Assizes or Sessions, where parties cannot appear by attorney, the proper

(1) 2 B. & Ald. 162.

45 L. J. C. P. 213 (affd. 5 C. P. Div.

(2) Cited in *London Joint Bank v. Mayor of London* (1875) 1 C. P. D. 1, 11,

494, 6 App. Cas. 393; and see C. O. R. 1886, r. 98,—A. C.

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course is to remove it into this Court by *certiorari*, and compel appearance by distress infinite.

On motion to quash such indictment, as not maintainable against a corporation, the Court refused to quash, but directed them to demur, reserving leave to them, if judgment should be given against them on the demurrer, to plead over.

INDICTMENT, found at the Spring Assizes for the county of Worcester, 1840, against a corporation aggregate, the Birmingham and Gloucester Railway Company, for disobedience to an order of justices and an order of Sessions confirming it, whereby the defendants, pursuant to certain provisions contained in the statute (1) incorporating the Company, were directed to make certain arches to connect lands which had been severed by the railway. The defendants not coming in to plead under the usual *venire*, some of the goods of the Company were seized under a *distringas*; and at the Worcester Summer Assizes, 1840, two of the Directors appeared in Court to plead, but the officer of the Court refused to receive their plea; and, an application on the subject being made to the learned Judge (PARKE, B.), he intimated an opinion that the defendants could appear only by attorney, that they could not appear by attorney at the Assizes, and that the only course was to remove the indictment by *certiorari* into this Court, and that the defendants should plead by attorney there (2).

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In Hilary Term (January 21st), 1841, *Whateley* obtained a rule for a *certiorari* to bring up the indictment; LITLEDALE, J. observing, on the motion, that he never heard of an indictment against a Company for disobedience to an order. In the same Term *Whateley* obtained a rule to show *cause why the indictment should not be quashed, as not being maintainable against a corporation. In Trinity Term, 1841 (3),

Talfourd, Serjt., showed cause, and contended that, although an indictment for misfeasance would not have lain, corporations were indictable for omission of duty (4). (The authorities and precedents mentioned were again cited on the argument of the demurrer.) He also urged that the objection taken was no ground

(1) 6 & 7 Will. IV. c. xiv., local and personal, public.

(2) *Reg. v. The Birmingham and Gloucester Railway Company*, 9 Car. & P. 469.

(3) May 27th. Before Lord Denman, Ch. J., Patteson, Williams, and Wightman, JJ.

(4) Stat. 6 & 7 Will. IV. c. xiv., s. 1, enacts that the Company may "sue and be sued" by their corporate name; and sect. 120 regulates the form of indictment in prosecutions by them: but the Act gives no direction as to indictments against them.

for a motion to quash, but might be raised on demurrer, in arrest of judgment, or by writ of error. On this point he cited *Rex v. Cooke* (1).

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Whateley, in support of the rule, contended that in all the precedents individuals were pointed out against whom ulterior proceedings could be taken on conviction: here it was not known who composed the Company. And that, if the prosecutors demurred and judgment were given against them, they would be concluded.

LORD DENMAN, Ch. J.:

As to the proceedings, I do not feel the difficulty so strongly as you put it. We do not, however, wish to decide the point on this motion. We take upon ourselves to say that you may demur; and, if we decide against you, you may plead over.

PER CURIAM:

Rule discharged.

The defendants appeared in this Court, and demurred: and, the prosecutors having joined in demurrer, the case was argued, in last Hilary Term (2), by

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Whateley, for the defendants:

This indictment might have been found at Sessions; and the defendants, though willing to plead and exposed to a *distringas* from time to time for not pleading, could not have pleaded below, because as a corporation they can appear and plead only by attorney, whilst at Sessions the parties must appear in person. This is a strong argument against the validity of such an indictment; and it is no answer to say that the indictment may be removed into the Crown Office (3). But, supposing the defendants to have pleaded and to have been found guilty, no punishment can follow: the judgment for a misdemeanour is that the defendant be fined, *et quod idem* A. B. *ciatur ad satisfaciendum dicto Domino*

(1) 2 B. & C. 618.

(2) Wednesday, January 26th. Before Patteson, Coleridge, and Wightman, JJ.

(3) "Although" "at the Assizes and Sessions, the defendant must appear in person, before plea, it is otherwise in the King's Bench in the

case of misdemeanours;" 1 Chit. Cr. L. 411, 2nd ed. Even in this Court, the appearance of a defendant in a criminal case by attorney seems to be *ex gratia curiæ*. See 4 Hawk. P. C. 118, 7th ed. B. 2, c. 26, s. 53, *Bacon's* case, 1 Lev. 146.

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regi de fine prædicto : that is the form in *Fanshawe's* case (1) ; and a similar form is used in *Holles's* case (2). A corporation aggregate cannot be taken ; and, supposing it to have no property, there is no punishment that could be enforced : they cannot “ be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney : 33 Hen. VIII. Br. Fealty ” (3), *The Case of Sutton's Hospital* (4). So in Com. Dig. Franchises, * (F. 19), it is said that “ process of outlawry does not lie against a corporation aggregate ; ” “ and therefore trespass does not lie against a corporation, but against the particular persons only ; for a *capias* and *exigent* do not go against a corporation.” And in an *Anonymous* (5) case, in 12 Mod., it is said : “ Note : per HOLT, Ch. J. A corporation is not indictable, but the particular members of it are.” The authorities which may be cited on the other side do not impugn this position. There is the precedent of an indictment (6) against a Company of Proprietors and certain individuals, assignees of the corporation of Bath, for non-repair of a bridge : but the joinder of individuals removes the difficulty ; for they might be taken to satisfy the fine. In *Rex v. Mayor &c. of Liverpool* (7) this objection was not taken, and the indictment failed on a different ground. In *Rex v. Mayor of Stratford-upon-Avon* (8) the indictment, which was for non-repair of a bridge, was successful ; but this objection was not taken ; and, as the defendants were indicted by their corporate style of Mayor, aldermen and burgesses, the difficulty would not exist, for the sheriff would only have to ascertain the individual person who was mayor, and take him ; and the same observation applies to all the modern cases. It appears from a note in the Crown Office that in *Rex v. Owners and Occupiers of ground called Burn, in the parish of Easingwold* (9), for not repairing a highway, a motion was made to quash the indictment because no particular person was named : a rule *nisi* was granted ; and in the following Term the rule was made absolute without opposition ; and this remark is appended : “ It appears therefore that an indictment *of a road repairable *ratione tenure* ought to mention the names of the persons bound to repair, and not to run generally against the owners, &c., as if it was against the

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- (1) Trem. P. C. 202, 204.
- (2) Trem. P. C. 294, 302.
- (3) Bro. Ab. Fealtie and Homage, pl. 15.
- (4) 10 Co. Rep. 1 a, 32 b.

- (5) 12 Mod. 559.
- (6) 3 Chit. Cr. Law, 600.
- (7) 6 R. R. 546 (3 East, 86).
- (8) 14 East, 348.
- (9) Hil. T. 1778 ; by Mr. Dealtry.

inhabitants of a district." It is not contended that the Company cannot be punished for disobedience; but this is not the form. In some recent indictments against a Gas Company a shareholder was indicted by his individual name. If it be said that, although, in the case of a misfeasance, the individual members who are guilty must be indicted, a corporation as such is indictable for nonfeasance, this case falls within the distinction, for the indictment is for a contempt, averring notice: notice cannot be given to the corporation, but only to individual members: and if one of them can be shown to have had notice he is liable for the contempt.

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Talfourd, Serjt., contra:

For a nonfeasance a corporation aggregate is indictable in the corporate name: there is indeed no direct authority for the position; but the course of precedents has been uniform for centuries; and the doctrine has frequently been taken for granted both in arguments and by the Judges, and is consistent with every thing advanced on the other side except the *Anonymous* note in 12 Mod. (1). Mr. Kyd comments on that case (2), and draws the distinction correctly: "It seems" that, "where a corporation is bound to keep a bridge or a highway in repair, an indictment will lie against it for not repairing. It is, indeed, reported to have been said by Lord Chief Justice Holt, that a corporation is not indictable, but the particular members of it are; but I apprehend that can apply only to the case of a crime or misdemeanour, and *that an indictment may lie against a corporation, in the cases mentioned, as well as against a county or a parish." In cases of active misfeasance the individuals step out of their corporate capacity: and it may be on this analogy that it is said trespass will not lie: but trover will, and, as it seems, even for the act of servants not authorised under seal: *Yarborough v. Bank of England* (3); and doubtless it would now be held that trespass will lie (4). There seems to be no reason against pleading either at Assizes or Sessions by attorney properly constituted; at all events the party might plead in this Court: the process will be the same as it is in all cases where outlawry does not lie: thus, on an

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(1) 12 Mod. 559.

(2) 1 Kyd on Corp. 225, ch. 2, s. 1.

(3) 14 R. R. 272 (16 East, 6). See *Smith v. The Birmingham Gas Company*,

40 R. R. 358 (1 Ad. & El. 526).

(4) It was so held in *Maund v. Monmouthshire Canal Company*, C. P., June 8th, 1842; 5 Scott, N. S. 457.

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indictment against a peer, other than for treason, felony, or force, it is by *venire* and distress infinite: 4 Hawk. P. C. 139, B. 2, ch. 27, s. 12 (1). The difficulty now suggested was felt and overcome as to an appearance in Chancery; in *Salmon v. The Hamborough, Company* (2) a bill was dismissed because in the ordinary course of proceedings the Chancery could not relieve the plaintiff; for the defendants, being a Company, and served with process would not appear, they having nothing to be distrained by: but on appeal the House of Lords ordered that the dismissal should stand reversed, that the Court of Chancery should issue forth the usual process, and, if cause were, a *distringas* thereupon against the corporation, and that, if upon return of the process the corporation should not appear, or *should appear and not answer, the bill should be taken *pro confesso*, and a decree should thereupon pass, to be enforced, if necessary, by levies upon every member of the Company. In *Rex v. Clifton* (3) the same difficulty was urged as a reason for not indicting a whole parish for non-repair where it lay in two counties; and (though ASHHURST, J. differed in opinion) Lord KENYON and BULLER, J. held that the difficulty might be obviated by removing the record into this Court. Neither does it follow that because it may turn out under certain circumstances, such as want of corporate property, that a corporation cannot be punished, it is therefore not indictable: otherwise there could not be a *mandamus* to a corporation; for on a contempt obedience is enforced by attachment (4): parishes are indicted for the non-repair of highways, and counties for non-repair of bridges; but they cannot be imprisoned.

(COLERIDGE, J.: You indict the inhabitants of the parish, and the men of the county: may you not take any of them?)

In practice all of them could not be taken; but any particular inhabitants may be made the defendants, which is otherwise in the case of a corporation. In *Rex v. The Severn and Wye Railway Company* (5) it was assumed that the Company might have been indicted for taking up their railway, which was a public highway;

(1) See also 4 Hawk. P. C. 143, B. 2, pl. 2.

c. 27, s. 14; *Rex v. Mayor &c. of Hertford*, 1 Salk. 374; 1 Chit. Cr. L. 347, 348.

(2) Ca. Chanc. 204; S. C. 6 Vin. Abr. 310, tit. Corporations (B. a),

(3) 2 R. R. 657 (5 T. R. 498).

(4) See *Morgan v. The Corporation of Carmarthen*, 3 Keb. 350.

(5) 21 R. R. 433 (2 B. & Ald. 646).

and the books contain many precedents of similar indictments (1). That of *Rex v. The Mayor &c. of Stratford-upon-Avon* (2) is *very strong. The mode in which a corporation might be reached was discussed in the case of *Thusfeild and Jones, Master and Wardens of the Company of Waxchandlers* (3), who, being cited in the spiritual Court, for a church-rate on the Company's hall, by their names of baptism and their surnames, with the addition of Master and Wardens of the Company of Waxchandlers, moved for a prohibition on the ground that they were sued in their natural capacity, when it should be in their politic capacity; "but the Court said, there was no other way of citing them than this; they could not cite the body politic; and therefore, unless by this way, they had no remedy: and it was not like a *distringas* at common law, by which they may take lands or goods of the Company; but if the Company had neither land nor goods, there was no way to make them appear; but here they said they were cited by their proper names, but in their politic capacity; but if they stood out, then they must lie by the heels in their natural capacity:" and the prohibition was denied.

It is clear that no individual member of the corporation could be indicted for an act done by him as one of the corporation; unless perhaps it were proved that he had committed a wrong from malicious motives: *Harman v. Tappenden* (4); and, whatever might be the case if the order were made on individual members, here it is made on the corporation as such, and, under the Act, it could not have been otherwise. The joinder of individuals in *Rex v. The Kennet and Avon Navigation Company* (5) could make no difference; for the individual defendants could not plead for the Company. *Corporations have pleaded misnomers to actions brought against them. It does not follow that, because process of outlawry does not lie, a party is therefore not indictable: in *The Lord Ducre's* case (6) the defendant was indicted for encroaching upon the highway, and an exception was taken under the Statute of Additions, 1 Hen. V. c. 5, because it was not expressed of what place he was: "*sed non allocatur*, for process of outlawry lieth not against him, but distress."

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(1) He referred to Cro. Circ. Comp. 355, 3 Chit. Cr. L. 586, 4 Wentw. 157. 3 Chit. Cr. L. 603 (indictment against the Dean and Chapter of Christchurch, and the Mayor, Bailiffs and Commonalty of Oxford, for not cleansing a watercourse), was also cited, in show-

ing cause against the motion to quash.

(2) 14 East, 348.

(3) Skin. 27.

(4) 6 R. R. 340 (1 East, 555).

(5) 3 Chit. Cr. Law, 600.

(6) Cro. Eliz. 148. See also *Johnson's* case, Cro. Jac. 609.

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Whateley, in reply :

In all the modern precedents individual members of the corporation are included or ascertained, and they may be proceeded against. In the case of *The Corporation of Poole* (1) it was found necessary to direct the *mandamus* to individuals specified by name.

Cur. adv. vult.

PATTESON, J., in this Term (May 28th), delivered the judgment of the COURT :

After stating the indictment, removal by *certiorari*, appearance, demurrer, and ground of demurrer, his Lordship proceeded as follows :

Upon the argument it was not contended on the part of the Company that an action of trespass might not be maintained against a corporation ; for, notwithstanding some *dicta* to the contrary in the older cases, it may be taken for settled law, since the case of *Yarborough v. The Bank of England* (2), in which the cases were reviewed, that both trover and trespass are maintainable : *but it was said that an indictment will not lie against a corporation. Only one direct authority was cited for this position ; and it is a *dictum* of Lord HOLT in an *Anonymous* (3) case reported in 12 Mod. The report itself is as follows : “ Note : per HOLT, Chief Justice. A corporation is not indictable, but the particular members of it are.” What the nature of the offence was to which the observation was intended to apply does not appear ; and as a general proposition it is opposed to a number of cases, which show that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults : Hawk. P. C. B. 1, c. 66, s. 13 (4).

A corporation aggregate may be liable by prescription, and compelled, to repair a highway or a bridge : Hawk. P. C. B. 1, c. 76, s. 8 ; c. 77, s. 2 (5) : and in the case of *Rex v. The Mayor &c. of Liverpool* (6) the corporation were indicted by their corporate name for non-repair of a highway, and, upon argument in this Court, the indictment was held to be defective ; but no question was made as to the liability of a corporation to be indicted.

(1) See *Reg. v. Ledgard* and others,
55 R. R. 390 (1 Q. B. 616, 620).

(2) 14 R. R. 272 (16 East, 6).

(3) 12 Mod. 559.

(4) Vol. ii. p. 58, 7th ed.

(5) Vol. ii. pp. 156, 256.

(6) 6 R. R. 546 (3 East, 86).

In the case of *Rex v. The Mayor &c. of Stratford-upon-Avon* (1) the corporation was indicted by its corporate name for non-repair of a bridge, and found guilty, and upon argument in this Court the verdict was sustained, and no question made as to the liability generally of a corporation to an indictment for breach of a duty cast upon it by law.

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Upon the discussion of the question in the present case, the counsel for the Company relied chiefly upon the circumstance of the indictment being found at the Quarter Sessions (2), where the Company could not appear and take their trial, even if so disposed, as a corporation can only appear by attorney, and the appearance at the Sessions must be in person. We think there is no weight in this objection. It may indeed impose some difficulty upon the prosecutor, and render his proceeding more circuitous, as he will be obliged to remove the indictment by *certiorari* into this Court in order to make it effective; but the liability of the corporation is not affected.

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In the case of *Rex v. Gardner* (3) it was objected that a corporation could not be rated to the poor, because the remedy by imprisonment upon failure of distress was impossible; but the Court considered the objection of no weight, though it might be that there would be some difficulty in enforcing the remedy.

The proper mode of proceeding against a corporation, to enforce the remedy by indictment, is by distress infinite to compel appearance, after removal by *certiorari*, as suggested by Mr. Baron PARKE in this very case, reported in 9 Car. & Payne, 469, and as appears by Hawk. P. C. B. 2, c. 27, s. 14 (4), and the cases cited in 6 Vin. Abr. 310, &c. tit. Corporations (B. a) (4).

We are therefore of opinion that upon this demurrer there must be judgment for the Crown.

Judgment for the Crown (5).

(1) 14 East, 348.

(2) It was so put, hypothetically, in the argument for the defendants.

(3) 1 Cowp. 79.

(4) Vol. iv. p. 140.

(5) The defendants pleaded over in the same Term (see p. 209, *ante*), and were convicted at the ensuing Summer Assizes, 1843, and fined 6s. 8d.

1842.
May 30.

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ROSCORLA v. THOMAS.

(3 Q. B. 234—238 ; S. C. 11 L. J. Q. B. 214 ; 2 G. & D. 508 ; 6 Jur. 929.)

Declaration stated that, in consideration that plaintiff, at the request of defendant, had bought a horse of defendant at a certain price, defendant promised that the horse was free from vice ; but it was vicious : Held bad, on motion in arrest of judgment ; for that the executed consideration, though laid with a request, neither raised by implication of law the promise charged in the declaration, nor would support such a promise, assuming it (as must be assumed on motion in arrest of judgment) to be express.

ASSUMPSIT. The declaration stated that, whereas heretofore, to wit &c., in consideration that plaintiff, at the request of defendant, had bought of defendant a certain horse, at and for a certain price &c., to wit &c., defendant promised plaintiff that the said horse did not exceed five years old, and was sound &c., and free from vice ; nevertheless defendant did not perform or regard his said promise, but thereby deceived and defrauded plaintiff in this, to wit, that the said horse, at the time of the making of the said promise, was not free from vice, but, on the contrary thereof, was then very vicious, restive, ungovernable, and ferocious ; whereby &c.

Pleas : 1. *Non assumpsit*. Issue thereon.

2. That the horse, at the time of the supposed promise, was free from vice, and was not vicious, restive, ungovernable or ferocious, in manner &c. : conclusion to the country. Issue thereon (1).

On the trial, before Wightman, J., at the Cornwall Spring Assizes, 1841, a verdict was found for the plaintiff on both the above issues. In Easter Term, 1841, *Bompas*, Serjt. obtained a rule *nisi* for arresting the judgment on the first count (2). In last Term (3),

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Erle and *Butt* showed cause :

The objection is, that the first count states only a *nudum pactum*. But there is an executed consideration, which, with a request, will support a promise. Now the request need not be express : wherever the law will raise a promise, a request by the party promising will be implied : note (c) to *Osborne v. Rogers* (4). *Payne v. Wilson* (5) was the converse of the present case : there a

(1) There were other counts, on which issues were joined and found for the defendant.

(2) The rule was also for entering a verdict, on the evidence, for the defendant ; but on this the Court did

not decide.

(3) April 28th, 1842. Before Lord Denman, Ch. J., Patteson, Williams, and Wightman, JJ.

(4) 1 Wms. Saund. 264 a.

(5) 7 B. & C. 423.

consideration, which in its form was executed, was declared on as executory; and this was held to be no variance, because in reality the consideration was continuing. Here the declaration states an executed consideration in form; but it is, practically, executory, because the sale and warranty would be coincident. In *Thornton v. Jenyns* (1) the declaration charged that, in consideration that plaintiff had promised to defendant, defendant then promised plaintiff. It was objected that this was an executed consideration without a request, which was insufficient where the law would not raise a promise; and *Brown v. Crump* (2) was cited: but the Court held that the two promises might be considered as simultaneous, and that the objection therefore could not be sustained (3).

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Bompas, Serjt. and Slade, contra:

The warranty ought to be given at the time of the sale: if made after, it is without consideration: 3 Blackst. Com. 166, Com. Dig. Action upon the Case for a Deceit (A. 11), *Roswell v. Vaughan* (4), *Pope v. Learyns* (5). *Thornton v. Jenyns* (1) *was a case of mutual promises, which can never literally be made at the same moment: here the declaration definitely lays the perfect sale as antecedent to and distinct from the warranty. And the warranty is a matter not implied by law upon a sale: *Parkinson v. Lee* (6). Even an express promise without a legal consideration is invalid: *Collins v. Godefroy* (7). In *Hopkins v. Logan* (8) there was an executed consideration from which a promise to pay on request would have arisen: and it was holden that this did not support a promise to pay on a future day named.

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(PATTESON, J. referred to *Hunt v. Bate* (9), as cited in *Eastwood v. Kenyon* (10), and to *Lamplough v. Brathwait* (11).)

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (May 30th), delivered the judgment of the COURT:

This was an action of assumpsit for breach of warranty of the

(1) 1 Man. & G. 166.

(2) 1 Marsh. 567.

(3) It was also argued that the warranty might here, after verdict, be taken to be coincident with the sale: to which it was answered that, if it were so, the evidence negatived the declaration.

(4) Cro. Jac. 196.

(5) Cro. Jac. 630.

(6) 6 R. R. 429 (2 East, 314).

(7) 35 R. R. 496 (1 B. & Ad. 950).

(8) 52 R. R. 704 (5 M. & W. 241).

(9) 3 Dyer, 272 a.

(10) 52 R. R. 400 (11 Ad. & El. 438, 452).

(11) Hob. 105, 5th ed. See *S. C.*, 1 Smith's Leading Cases, 67 (11th Ed. 141).

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soundness of a horse. The first count of the declaration, upon which alone the question arises, stated that, in consideration that the plaintiff, at the request of the defendant, had bought of the defendant a horse for the sum of 30*l.*, the defendant promised that it was sound and free from vice. And it was objected, in arrest of judgment, that the precedent executed consideration was insufficient to support the subsequent promise. And we are of opinion that the objection must prevail.

[*237] It may be taken as a general rule, subject to exceptions *not applicable to this case, that the promise must be coextensive with the consideration. In the present case, the only promise that would result from the consideration, as stated, and be coextensive with it, would be to deliver the horse upon request. The precedent sale, without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear, therefore, that the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, express: and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.

The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note (a) to *Wennall v. Adney* (1), and in the case of *Eastwood v. Kenyon* (2). They are cases of voidable contracts subsequently ratified, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law.

[238] The rule for arresting the judgment upon the first count must therefore be made absolute.

Rule absolute.

(1) 6 R. R. 780 (3 Bos. & P. 249).

(2) 52 R. R. 400 (11 Ad. & El. 438).

REG. v. THE INHABITANTS OF VANGE (1).

(3 Q. B. 242—256; S. C. 11 L. J. M. C. 117; 2 G. & D. 474; 6 Jur. 893; 6 J. P. 668.)

1842.
May 28.
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The proprietors of lands, situate in parish V. and other parishes of the Isle of Canvey, granted one third of all the lands in fee to J., in consideration of his embanking and keeping from inundation all the lands in the island. By a local Act afterwards passed, Commissioners were appointed to keep up the embankment, and empowered for that purpose to tax the owners and occupiers of the granted lands by an annual rate, to the full annual rent or value of such lands respectively; and, if the monies so levied should prove insufficient (but not otherwise), to tax the other lands in the island.

W. H., being the owner and occupier of all the granted lands in V., was rated, by the Commissioners, as owner and occupier, for that property, described in the rate as “house, premises and lands.” W. H. had taken the lands subject to the above liability, paying no purchase money. The assessment on these and the rest of the granted lands equalled the rack-rent or full annual value. The annual expenditure on the embankment was necessary to maintain the lands within the island in a state to command any rent from a tenant or to be capable of occupation by the owner.

Held that W. H. was rateable to the poor in V. for the full annual value of his said lands, without deduction on account of the embankment tax.

By a rate made for the relief of the poor of the parish of Vange, in Essex, and allowed, March 23rd, 1841, William Hilton was assessed in the sum of 9*l.* 6*s.*, as the occupier of premises in Canvey Island; the extent of which premises was estimated at 133*a.* 1*r.* 6*p.*, the gross rental at 143*l.*, and the rateable value at 128*l.* The Commissioners of Sewers of Canvey Island were stated to be the owners. On appeal, the Quarter Sessions amended the rate, leaving it as follows (2):

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Name of Occupier.	Name of Owner.	Description of Property, &c.	Name or Situation of Property.	Estimated Extent.			Gross estimated Rental.			Rateable Value.			Rate at 1 <i>s.</i> 6 <i>d.</i> in the Pound.		
				a.	r.	p.	£	s.	d.	£	s.	d.	£	s.	d.
Hilton, William.	Hilton, William.	House, premises and lands.	Canvey Island.	108	0	0	143	0	0	0	0	0	0	0	0

subject to the opinion of this Court on the following case.

The appellant was the owner and occupier of the property for which he was assessed, being a farm called Scar House, lying in that part of the parish of Vange which is situate in Canvey Island. This island contains altogether about 4,000 acres, and is situate in, or forms detached parts of, the parishes of Vange and eight others. A considerable portion of the lands of the island are called and

(1) Distinguished in *Reg. v. Smith* (1885) 53 L. J. M. C. 53; and see *R. v. Gainborough Union* (1871) L. R. 7 Q. B. 64, 66, 48 L. J. M. C. 1.—A. C.

(2) The first column, headed “No. of assessment,” and the third and fifth, headed “No. of votes,” are omitted.

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known by the name of "Third Acre" lands; of which description the farm before mentioned entirely consists. In the year 1621, Sir Henry Appleton and others, being the owners of certain lands lying in Canvey Island, which lands were at every spring tide overflowed by the river Thames, by indenture, dated 9th of April, 1621, contracted and agreed with Joos Cropenburgh for the innning, enclosing and fencing of all the grounds in the island, and the same, at his own proper costs and charges, maintaining and keeping from all inundations and overflowsings of the said river Thames for ever: and it was in and by the said indenture covenanted and agreed that the said Joos Cropenburgh, in consideration thereof, and of his great pains, hazard and charge in and about the innning and fencing of the said grounds from the inundation and overflowing of the said waters, should have and enjoy to him and his heirs, in fee simple for ever, one full third part of all and singular the lands of the said parties, situate in the said island.

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Joos Cropenburgh having inned, gained, recovered and fenced the lands of the island, the said indenture was, in Hilary Term, 1622, by consent of all parties thereto, made a decree of the Court of Chancery; and the third part of all the same lands so inned was thereby decreed and established to Joos Cropenburgh, his heirs and assigns for ever, upon the conditions in the said indenture mentioned.

The lands thus vested in Joos Cropenburgh, his heirs and assigns, were and are called the "Third Acre" lands, and are known by that name: and the farm before mentioned, belonging to and occupied by appellant, comprises a part thereof. Those lands which remained in Sir Henry Appleton and other persons were and are called the "Free Lands." And those lands which have been since the embankment of the island recovered at different times from the sea by different individual proprietors are called "Outsands."

By statute 32 Geo. III. c. 31, intituled "An Act for more effectually embanking, draining, and otherwise improving, the Island of Canvey, in the county of Essex" (and which is declared a public Act), certain Commissioners therein named, and their successors, to be appointed as in the said Act is mentioned, were directed and required from time to time, and at all times thereafter, to support or build, raise, strengthen and maintain the walls and banks and other works of drainage then standing and being in the island (except such as were erected and made around those parts called the Outsands), and to make and erect such other walls and banks, sluices and tunnels, and to cut such other drains in, upon,

through and over the island (except as aforesaid), as should be necessary for the more effectually *protecting, preserving and draining of the island ; and all such walls, banks, drains, sluices, tunnels and other works from time to time to repair, support, maintain, work, cleanse and use in such manner as the Commissioners should direct and appoint (1).

The Act (2) then gave the Commissioners power, for the above purposes, from time to time, and at all times thereafter, to tax and charge the owners or occupiers of the Third Acre lands (3) to the full annual rent or value of such lands respectively, if necessary (4). And the Commissioners were by the Act further empowered, if the monies to be raised upon the owners or occupiers of the Third Acre lands should not amount to the sums which the exigencies of the several years might require, to supply such deficiency by taxing and assessing the several other lands within the island, except the Outsands (5).

Since the passing of the Act, the several works therein mentioned have been and are vested in the Commissioners and their successors for the purposes of the Act : and they have, in the exercise of the powers given them by the Act, repaired and kept in repair the walls, embankments and other works mentioned in the Act ; and have, in three recent years (viz. 1837, 1838, and 1839), in consequence of the proceeds of the Third Acre lands being insufficient for the exigencies of those years, and in pursuance of such powers, assessed and raised certain sums of money on the " free " lands to supply such deficiency. The whole of the sums assessed and raised

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(1) Sects. 1, 11.

(2) Sect. 19.

(3) " By an annual rate or assessment upon the several owners and occupiers " &c.

(4) " But if not, then only *pro tanto* by an annual pound rate."

(5) Sect. 19. But the owners, proprietors or occupiers of such several other lands were not to be taxed " except in the case of the absolute inability of the owners of the said Third Acre lands, in respect of those lands, to raise and supply the monies which from time to time may be wanted."

Sect. 27 provides, " That it shall be lawful for all persons who shall be tenants at rack-rent of the said lands, and who shall have paid any rate or

tax to be imposed or levied by virtue of this Act, or from whom the same shall have been recovered, to deduct or reimburse themselves the monies they shall have so paid, or which shall have been recovered from them as aforesaid, and all expenses attending the same, out of the next rent to become due and payable to their respective landlords, who shall and are hereby required to allow such deduction accordingly "

Sect. 38 exempts the works made or to be made under this Act from the survey, controul, direction or order of the Commissioners of Sewers.

Parts of sects. 1 and 19, cited, p. 224, *post*, do not require further mention.

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by the Commissioners are applied generally to the repair of the whole of the works vested in the Commissioners; and no sum assessed and raised upon any particular portion of land is applied to any particular portion of the works. There are no more or other Third Acre lands within the parish of Vange than the farm before mentioned. The other land in the island, situate within Vange parish, consists of the "free" land.

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The appellant paid nothing for the purchase of the Scar House farm; which he has occupied as the owner thereof, subject to the liabilities imposed on it by the above mentioned decree and Act of Parliament. The quantity or extent at which the Scar House farm was estimated in the original assessment includes the portion occupied by that part of the sea wall or embankment, vested in the Commissioners, which is contiguous, and upon which the farm is abutting. And the extent at which the same farm is estimated in the rate, as amended by the Sessions, is the extent of that portion which belongs to and is occupied by the appellant, *exclusive of the same sea walls, embankments and other works vested in the Commissioners.

For several years since, the sums assessed and raised by the Commissioners upon the Third Acre lands for the purposes of the Act have been equal to the rack-rent or full annual value of those lands; and the sum which has been assessed upon and paid by the appellant in respect of the Scar House farm has been, for the current and preceding years, 123*l.* per annum.

The annual outlay and expenditure in and about the repair and maintenance of the sea walls, embankments and other works mentioned in the Act has been and is an expense necessary to maintain the lands within the island in a state to command any rent from a tenant, or to be capable of occupation for any purpose by the owner.

No deduction whatever is made to the appellant, in the rate appealed against, in respect of the sea-wall rate, or embankment tax, paid by him as before mentioned.

The question for the opinion of this Court was, whether the said sum of 123*l.*, so assessed upon and paid by the appellant, ought to be deducted from the assumed "gross rental" in estimating the "annual" or "rateable" value of the same farm and lands in assessing the appellant to the poor rate. The decree in Chancery was annexed to the special case, and to be considered part of it.

The case was argued in last Term (1).

(1) April 27th. Before Lord Denman, Ch. J., Patteson, Williams and Wightman, JJ.

Sir W. W. Follett, Solicitor-General, *Knox*, *Ryland* and *W. H.*

Watson, in support of the order of Sessions:

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First, if the appellant's land were rateable at all, the whole 123*l.* assessed by the Commissioners upon the Scar House farm must be deducted from the net annual value. In the judgment of this Court in *Rex v. Adames* (1) it is said: "The question" "is, in effect, whether the occupier of lands in a district" "which is liable to be flooded, and is protected from floods at a certain occasional expense (for that is the nature of the sewers' rate), ought to be rated at the same sum as the occupier of lands of similar quality and of equal annual produce, lying in the same parish, but not liable to the same expense. We are of opinion that he ought not. It is obvious that the average annual net profit of one description of land is not the same as that of the other; and, both upon principle and authority, we think the rate ought to be made in proportion to that profit." And again: "If the subject of occupation be of a perishable nature, or require an annual expense to secure its existence, an allowance ought to be made on this account; for the total annual profit is not the net annual profit; a part must be set aside for the restoration and maintenance of the subject of occupation. It is on this principle that buildings have been permitted to be rated at less in proportion than arable and other land. The cases, especially those of a more recent date, in which the principle of rating has been more fully discussed and considered, will be found to have established this rule of rating, which is, in other words, that all lands are to be assessed in proportion to the net rent which a tenant at rack-rent would pay, he discharging all rates, charges and outgoings." Applying these principles (which have *since been adopted in the Parochial Assessment Act, 6 & 7 Will. IV. c. 96) to the present case, the necessary expense incurred by the appellant in the maintenance of sea walls, and for the other purposes of the local Act, will reduce the rateable value of his property to nothing; since he pays, to command the rent on which the rate should be estimated, a sum exceeding that rent. The "annual outlay," as described in the case, falls literally within the words of stat. 6 & 7 Will. IV. c. 96, s. 1, "other expenses, if any, necessary to maintain them in a state to command such rent:" the Sessions have, in effect, determined that the payment was of such a character; and the point was one properly to be decided by them. This burthen is, in effect, a sewers' rate, more than equalling the full annual

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value of the lands. It may be contended on the other side that this charge is in reality a rent, no other rent being paid; but that cannot be so, there being no value to command a rent. And, whenever this imposition is mentioned in the local Act, it is spoken of as a tax. That the appellant's land should be exempted from poor rate is no hardship on the other landholders in the parish, their property being increased in value by his outlay. If the charge now imposed on him were distributed over the parish, they would bear that additional burthen but pay less poor rate, according to *Rex v. Adames* (1). It makes no difference that, escaping this burthen, they pay more poor rate in proportion. It may be argued that the payment of this tax by the appellant is not, within the meaning of stat. 6 & 7 Will. IV. c. 96, s. 1, an expense necessary to maintain his own land in a state *to command rent, because it is for the protection of the level generally: but the effect of it is that his own land is raised in value.

But, secondly, the appellant may contend that he has no beneficial occupation of Scar House farm, the whole value being taken away for the purposes of the local Act, 32 Geo. III. c. 31, which, in sect. 1, recites that "the whole rents and profits of the said Third Acre lands have, for several years last past, been applied" to the repair and support of the sea walls and embankments; and, in sect. 19, authorises the Commissioners, by reason of those rents and profits being for the time inadequate, to tax other lands in the island, but enacts that no tax for the purposes of that statute shall be laid on any but Third Acre lands, "except in the case of the absolute inability of the owners of the said Third Acre lands, in respect of those lands, to raise and supply the monies which from time to time may be wanted."

Erle, E. James, and Marsh, contra :

First, the Third Acre lands should, at all events, pay poor rates to the extent of two thirds of the rack-rent. If the burthen in question were an ordinary sewers' rate for Canvey Island, the whole level would be bound to contribute; the Third Acre lands, which now pay the whole, would pay one third of the charge, the rest being distributed over the other lands in the level: and in that case the Third Acre lands would be exempt from poor rate to the extent of one third of the rack-rent, but liable on the other two thirds. The charge imposed upon the Third Acre lands is an

(1) 38 R. R. 223 (4 B. & Ad. 61).

annual expense, necessary, according to stat. 6 & 7 Will. IV. c. 96, s. 1, to maintain all the lands in a state to command their rent. Although, *by compact among the proprietors, it has been cast upon particular lands, it would, in the case of a common sewer's rate, be a burden upon all, and must be so reckoned in adjusting the poor rate. A private compact cannot alter the liability to such rate.

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It is argued that to exempt the appellant is no injustice to the other landholders in Vange, because, as they pay more to the poor rate, they pay, in proportion, less to the maintenance of sea walls and embankments. But the burthen on this latter account is, not on the parish of Vange, but on the island: and, although the island may be relieved by throwing part of that burden upon lands in Vange, it does not follow that the ability of the landholders in Vange to pay poor rate may be proportionably increased.

But, further, the appellant is rateable to the poor upon the entire rack-rent. He holds the land, enjoying all the advantages of an ordinary occupier; and it commands a rent of 123*l*. Upon that rent there is a known and permanent charge, by Act of Parliament, in respect of the sea walls and embankments. The appellant, individually, does not pay the charge in question for the purpose of maintaining his lands in a state to command rent, but to keep up public works. He holds his farm on the condition of contributing to this object, which is not necessarily connected with any benefit to his-own lands. It is as if he held on condition of repairing a street in London; or by some service wholly independent of any improvement of these lands. It happens that his own lands derive benefit from this payment; but they would be equally subject to the burden if they derived none. If the charge *equals 123*l*., it absorbs the rent: if it falls short of 123*l*., there is a surplus of rent, which the occupier, if holding under a landlord, would pay to him, but which the appellant, as owner and occupier, would receive to his own use. He has taken the land, with its benefits, subject to the incumbrance, and, in consideration of it, paid nothing for the purchase. The liability to pay, if necessary, 123*l*. is the condition upon which he enjoys land worth 123*l*. a year. The form in which that liability is imposed can make no difference.

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(WIGHTMAN, J.: You say that, if the appellant had let for 123*l*., a tenant under him would not be the less rateable as occupier, because the rent was swallowed up by the assessment.)

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That is the argument. It makes no difference to the occupier that the rent is handed over to the Commissioners. The case is the same as if the landlord were a mortgagor paying over the amount of the rent to a mortgagee. A party is rated to the poor as being the owner or occupier of property which is a subject of rate, and therefore having ability by something occupied within the parish; it is not necessary, in justification of the rate, to point out any mode in which a rent is made. In *Rex v. Terrott* (1), and other cases of the same class, this could not have been shown.

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As to *Rex v. Adames* (2), the sewers' rate there was an occasional charge on the occupier, not a permanent charge on the rent. The present case differs in both respects. PARKE, J., in delivering judgment, said: "Land which requires some occasional expenditure to preserve it from being damaged by water, and to make it as productive as it is, would let for less *rent than similar land which requires none, the tenant defraying amongst others that occasional expenditure. In other words, the net average annual profit of both is not the same, and consequently the rate ought not to be the same." That reasoning would be inapplicable here.

(WIGHTMAN, J.: What do you say is the annual value of this property in the appellant's hands?)

It is worth 123*l.* to him as occupier; as owner, nothing. But the rateability to the poor depends on the value to the occupier: and to what particular fund he pays over the rent is of no consequence.

Cur. adv. vult.

LORD DENMAN, Ch. J. in this Term (May 28th), delivered the judgment of the COURT:

This was an appeal against a poor rate for the parish of Vange, in the Island of Canvey, in the county of Essex, wherein the appellant was assessed, as the owner and occupier of a house, premises and lands, in the sum of 128*l.* The Sessions relieved the appellant by striking out the whole amount from the assessment, subject to the opinion of this Court upon the following case.

In the year 1621, Sir Henry Appleton and others conveyed to Joos Copenburgh one third of their lands, situate in the said island, in fee, upon consideration of his defending the same against the waters of the river Thames. The lands then so vested in

(1) 7 R. R. 302 (3 East, 306).

(2) 38 R. R. 223 (4 B. & Ad. 61).

Joos Copenburgh were and are called the "Third Acre" lands; and the premises for which the appellant is assessed form a portion of those lands. By an Act passed in 32 Geo. III. c. 91, for more effectually embanking &c. the said Island of Canvey, certain Commissioners were appointed, and empowered *to do such acts as to them might seem right from time to time, and necessary, to protect the said island: the said Commissioners were further empowered to tax the owners and occupiers of the "Third Acre" lands to the full amount of the annual rent or value of the same; and, also, if the monies raised therefrom should be insufficient, to tax other lands. The appellant paid nothing for the purchase of the said premises, but holds them as owner, subject to the liabilities aforesaid. The case then states that, for several years, the sums raised in the "Third Acre" lands for the purposes of the Act have been equal to the rack-rent or full annual value of those lands, and the sum assessed upon and paid by the appellant in respect of the said premises has been, for the current and preceding years, 128*l.* per annum.

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The question, thus presented for our consideration, is, whether the occupation of the premises by the appellant be such as to make him liable to the rate; a question of some difficulty, undoubtedly, and which is usually expressed to be, whether the occupation be beneficial. The distinctions in many of the cases upon this subject are certainly very fine; and, except the subject immediately under consideration requires it, we do not know that it is useful to enter into a minute examination of them. This question of beneficial occupation, moreover, has been frequently before the Court; and, at no distant time, we had occasion to comment upon the import and meaning of the expression. See the case of *The Governors of the Bristol Poor v. Wait* (1). We will only here again observe that "beneficial" and "profitable," *in the ordinary sense of the word, are not convertible terms; that a party holding property in its nature rateable is not discharged from his legal liability because he does it at a loss. Suppose a farmer to be able to prove that he was holding his farm at any assignable amount of loss, would that constitute an exemption from the poor rate? It is unnecessary, however, to put hypothetical cases: *Rex v. Parrott* (2) is the case. The unprofitable and losing occupation (expressly so found) of a coal mine was held to create no exemption, because a coal mine is, by the stat. of 43 Eliz. c. 2, *eo nomine* made rateable. In the

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(1) 44 R. R. 370 (5 Ad. & El. 1).

(2) 2 R. R. 672 (5 T. R. 593).

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present instance the subject of the rate is of the same description, "house" and "lands," and therefore directly within the statute. What, then, is to exempt this property from rateability? The answer is, because it yields no profit to the owner, the appellant. Suppose, however, the premises to be let to a tenant at the rent of 123*l.* per annum, the sum at which the Sessions seemed to think, if rateable at all, that they ought to be assessed. It seems to be clear that, in such case, the tenant would be rateable for such occupation. Again, suppose that, instead of having paid nothing for it, and taking it, as he has, with the incumbrance, he had purchased it, and left the whole purchase money unpaid, but secured by mortgage upon the property. In what respect would that charge have differed from the present? Yet in the case lastly supposed he surely would have been rateable. The case of *Rex v. Adames* (1), which was quoted in argument in support of the rate, was one of comparative amount of assessment; whether property A. was fairly rated in respect of property B.; but there was no question, as here, of abstract rateability.

[256] Upon the whole, we are of opinion that the said sum of 123*l.* ought not to be deducted from the assumed gross rental in assessing this appellant.

Order of Sessions quashed.

1842.
June 9.

SIR CHARLES MORGAN, BARONET, *v.* POWELL (2).

(3 Q. B. 278—285; S. C. 11 L. J. Q. B. 263; 2 G. & D. 721; 6 Jur. 1109.)

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In trespass for digging plaintiff's coals in his mine, and taking and converting them, the proper measure of damages is the value of the coal when it was first severed from the mine: if defendant has afterwards removed the coal and brought it to the pit's mouth, plaintiff cannot recover damages according to the increased value given to it by these operations, though he may have had no opportunity of claiming the coal before they were performed.

The defendant, therefore, in trespass, must be allowed in damages for his expense and labour in removing the coal and bringing it to the pit's mouth, but not in first severing it from the mine.

TRESPASS for breaking and entering plaintiff's coal mine and strata, and digging and getting plaintiff's coal, to wit 20,000 tons &c., out of the said mine and strata; also for digging and making levels in certain strata &c. of plaintiff, and carrying away and

(1) 38 R. R. 223 (4 B. & Ad. 61).

L. R. 11 Eq. 188, 190, 40 L. J. Ch. 46;

(2) Approved in *Hilton v. Woods* (1867) L. R. 4 Eq. 432, 440, 36 L. J. Ch. 941; *Llynvi Coal Co. v. Brogden* (1870)

Burmah Trading Corporation v. Mirza (1878) L. R. 5 Ind. App. 130.—A. C.

converting the materials, to wit 10,000 cart loads of coal; and for carrying coals with horses, trams, &c., through the said levels; and by the several means aforesaid damaging the strata &c., and causing loss of plaintiff's coal &c. Judgment by default.

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An inquiry of damages was executed, before Coleridge, J., at the Monmouthshire Spring Assizes, 1841; when it appeared that the plaintiff and defendant were proprietors of adjoining coal mines, the defendant holding two, and the plaintiff a third, partly situate between them. The defendant had, from one of his own mines, entered that of the plaintiff, and had there worked coal belonging to the plaintiff, carried it away, and brought it up to the mouth of his own pit, and had also carried coal from one of his own mines (held under Lord Dynevor) through the workings so made in the plaintiff's mine. Compensation was claimed: 1. For the value of plaintiff's coal worked and taken away by defendant: 2. For the injury which plaintiff's unworked coal had sustained by the mode in which defendant had made the headings or workings: 3. In respect of the coal from Lord Dynevor's mine which *defendant had conveyed through the workings of plaintiff's mine. On the last two heads damages were assessed (1), as to which no subsequent question arose. On the first, the plaintiff demanded compensation at the rate per ton which a purchaser would pay for the coal at the pit's mouth, and which was proved to be 5*s.* 8*d.* For the defendant it was urged that he ought not to pay more than the value of the coal after deducting the expenses of cutting and bringing it to the pit's mouth, which were estimated at 3*s.* 10*d.* per ton. *Martin v. Porter* (2) was cited for the plaintiff; and the learned Judge, considering himself bound by the decision as stated, though he expressed a doubt of its correctness (3), advised the jury to give their verdict on the principle of the plaintiff's estimate, but reserved leave to move to reduce the damages by the difference between the values at the pit's mouth and in the ground. The jury found their verdict as directed; damages, on this head of claim, 1,400*l.*

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Sir J. Campbell, Attorney-General, in Easter Term, 1841,

(1) 1*s.* and 20*l.*

(2) 52 R. R. 745 (5 M. & W. 351).

(3) By a short-hand writer's note, his Lordship appears to have said: "But for that case I should have thought that the ordinary principle would have prevailed, and that Sir Charles Morgan would be entitled to

recover compensation only for the damage he has actually sustained, and that all he would have a right to ask at your hands would have been, to put him in the same position as he would have been if the coal had never been stirred."

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obtained a rule to show cause why the verdict should not be reduced "by the amount of the expense of getting the coals and bringing them to the pit's mouth." Cause was shown in Easter Term, 1842 (1).

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Ludlow, Serjt., for the plaintiff, cited *Martin v. Porter* (2).

The COURT then called upon the other side.

Sir W. W. Follett, Solicitor-General, *Talfourd*, Serjt., and *Keating*, in support of the rule :

This is an action of trespass for taking away the plaintiff's coal. In such an action he is entitled to recover the value which the coal had when it first became a chattel, that is, when it was first severed from the soil. The labour afterwards bestowed in bringing it to the pit's mouth gave it an additional value; but that cannot be brought into account by the plaintiff in the present action. This must be the effect of the decision, rightly understood, in *Martin v. Porter* (2).

(LORD DENMAN, Ch. J. : If a trespasser makes himself owner of the coal by digging it out, and then does something more to it, which increases the value, must not he bear the loss of such added value when the true owner recovers his property ?)

It would be hard to say where that doctrine would stop. If correct, it might apply when the coals had been carried to Newport, or London; or if ore had been taken, and manufactured. It would introduce a new estimate of damages in an action for mesne profits; if valuable crops had been raised during the wrongful occupation, the defendant could claim no allowance for culture.

(COLERIDGE, J. : There an entirely new thing would have been produced.

PATTESON, J. : Mesne profits for past years are estimated according to a fair rent. But, if a party is ejected while crops are in the ground, he gets nothing for them.)

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If the plaintiff had brought trover or detinue for the coal after it was brought to the pit's mouth, he might have recovered *the full value which it had then acquired, without deduction, or the coal

(1) May 2nd. Before Lord Denman, Ch. J., Patteson, Williams, and

Coleridge, JJ.

(2) 52 R. R. 745 (5 M. & W. 351).

itself, as improved in value; but the taking and converting for which this action is brought consist in detaching the mineral from the freehold, and must be referred to the moment when that was done.

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(*Ludlow*, Serjt. : The plaintiff may claim his damages for the coal as accruing at the first moment when he could take it; and that was when it reached the pit's mouth. He could not enter the pit to take it.)

That does not alter the nature of the claim in this action. If the plaintiff was put to any expense in obtaining the coal after the first severance, which he would not otherwise have incurred, that damage might be the subject of a distinct claim, but cannot be assessed here.

(*COLERIDGE*, J. : In an action of trover, the plaintiff might have recovered the goods, without deduction for the additional value, at the first moment when he was able to take them.)

That is a very different kind of action. The damage here lies in what was done at the time of severance from the mine itself; and the plaintiff must recover according to the value there and not elsewhere. This is precisely the opinion expressed by *PARKE*, B. at *Nisi Prius* in *Martin v. Porter* (1). The present case bears some analogy to *Jones v. Gooday* (2). There a Commissioner of Paving had cut away part of the plaintiff's land in widening a ditch; the plaintiff claimed to recover in trespass such a sum as would restore the land to its former condition; but the Court of Exchequer held that he could demand only so much as would compensate for the damage actually sustained. Here the plaintiff claims, not only that which would indemnify him for the damage complained of in this action, *but a large additional value created by the defendant's labour, and for which he furnishes no equivalent.

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(*Ludlow*, Serjt. mentioned *Wild v. Holt* (3).)

That case and *Martin v. Porter* (4), if they have the effect contended for, go too far. The argument drawn from them would show that, if a man had taken another's timber, and made it into a piece of

(1) 52 R. R. 745 (5 M. & W. 352).

Not then reported).

(2) 58 R. R. 649 (8 M. & W. 146).

(4) 52 R. R. 745 (5 M. & W. 351).

(3) 60 R. R. 860 (9 M. & W. 672).

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furniture, the loser might claim the article of furniture, or its value.

(LORD DENMAN, Ch. J. : It might be answered that the timber had become a different thing (1). But if a trespasser carries away my tree, and I follow and retake it, can he make a charge for his labour ?

COLERIDGE, J. : In trover, could the defendant set up a lien for the labour he had bestowed ?

LORD DENMAN, Ch. J. : The new value given by the wrongdoer might be less than the article would perhaps have had if left. The coal owner, in this case, might have deferred raising his coal till there was a better market (2).)

Ludlow, Serjt. and *R. V. Richards* were then called upon to show cause :

The argument from the increased value given by the trespasser's labour is answered by the passage in 2 Blackstone's Commentaries, 404, B. 2, c. 26, which lays down the doctrine adopted by our Courts from the civil law, as to "property arising from accession." And the rule, as applied here, is not unjust. The labour is bestowed upon the chattel without the owner's consent. He might wish to keep the tree in its first state, or to reserve his coal for the chance of a better market. When the tree has been wrongfully cut down and removed, the owner may follow and retake it at the first opportunity. Can it be said, when he claims to do so, that he shall not have his tree back without paying for the trimming, carriage, and turnpikes ? Here, a trespass was committed by severing the coal in the mine ; the owner could not retake it there ; by a continued trespass it was brought, through the defendant's land, to the pit's mouth ; and there, first, the owner was enabled to take it. Suppose, at that earliest opportunity, he had actually repossessed himself of the chattel ; could the trespasser then have sued him for work and labour done upon the chattel since the first severance ? Or could he have claimed a lien ? If the claim of reduction here be well founded, he might. *Jones v. Gooday* (3) has

(1) See Com. Dig. Biens (H.) (p. 141, 4th ed.) ; and the *Anonymous* case, Moore, 19, pl. 67, there cited.

(2) In the course of this argument, reference was made to the principle of

estimating damages laid down at Nisi Prius by PARKE, B. in *Wood v. Morewood*, Derby Summer Assizes, 1841. See p. 234, below.

(3) 58 R. R. 649 (8 M. & W. 146).

no bearing on this case. The decision of the Court of Exchequer last Term, in *Wild v. Holt* (1), supports and goes beyond that in *Martin v. Porter* (2).

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v.
POWELL.

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (June 9th), delivered the judgment of the COURT :

This was an action for breaking a mine, digging coal, carrying it unlawfully along the plaintiff's adit, and taking and converting it to the defendant's use. Judgment was suffered by default, and a writ of inquiry executed before my brother Coleridge.

The question was, how the value of the coal taken was to be estimated : and the learned Judge directed the jury to act on the rule laid down in *Martin v. Porter* (2). The rule, however, was misstated at the trial ; and the *calculation has been accordingly taken without making certain allowances which that rule provides for. The direction of the learned Judge in that case was, that the plaintiff was entitled to the value of the coal as a chattel, "at the time when the defendant began to take it away," that is (as there stated), as soon as it existed as a chattel ; which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth : and this direction the Court of Exchequer has affirmed. In the present case the rule was taken to be absolute, and without the deduction.

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We are of opinion that the rule in *Martin v. Porter* (2) is correct, and properly applicable to the present case. The jury must give compensation for the pecuniary loss sustained by the plaintiff from the trespass committed in taking his coal, compensation having been separately given for all injury done to the soil by digging, and for the trespass committed in dragging the coal along the plaintiff's adit : and the estimate of that loss depends on the value of the coal when severed ; that is, the price at which the plaintiff could have sold it. This plainly was the value of the coal itself at that moment. The defendant had no right to be reimbursed for his own unlawful act in procuring the coal ; nor can he, properly speaking, bring any charge against the plaintiff for labour expended upon it. But it could have no value as a saleable article without being taken from the pit : any one purchasing it there would, as of course, have deducted from the price the cost of bringing it to the

(1) 60 R. R. 860 (9 M. & W. 672).

(2) 52 R. R. 745 (5 M. & W. 351).

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POWELL.
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pit's mouth. Instances may easily be *supposed where particular circumstances would vary this mode of calculating the damage; but none such appear here. We do not find that the cost incurred by the defendant in bringing the coal to the pit's mouth is greater by a single farthing than that which the plaintiff must have incurred for the same purpose.

The damages found by the verdict must therefore be reduced by the amount of this charge, which may be ascertained by reference to the Judge's note; or there must be a new execution of the writ.

Rule absolute for reduction as above.

The following is a note of the case referred to in *Morgan v. Powell*, p. 282, note (2), *ante*.

1841.

*Derby
Summer
Assizes.*

PARKE, B.
[440, n.]

WOOD v. MOREWOOD (1).

(3 Q. B. 440, n.—441, n.)

[*441, n.]

THIS was an action by the plaintiff for an injury to his reversion in certain closes by making holes and excavations and getting coals, with a count in trover for coals. There were pleas of leave and licence, and that the defendant was seised as of freehold in the mines of coal, on which issue was joined. The defendant claimed under Sir John Zouch, who was seised of the closes, with others, and the beds of coal under the same, temp. Eliz., and conveyed all the coals belonging to him to one under *whom the defendant proved his title. The plaintiff claimed the closes in question by a prior conveyance of them, without the exception of coals, from Zouch. The defendant had won the coals under the closes, *bonâ fide* supposing that these were his own under his title from Zouch. Whether they passed or not depended upon the question whether an ancient settlement by another Zouch (temp. Eliz.), which existed at the time of the conveyance of the plaintiff's closes for value, was voluntary or not. There was also some evidence of licence as to part. The plaintiff claimed damages on the principle laid down in the case of *Martin v. Porter* (2), which amounted to about 10,000*l.* or 11,000*l.*

(1) Approved in *Hilton v. Woods* (1867) L. R. 4 Eq. 432, 440, 36 L. J. Ch. 941; *Llynvi Coal Co. v. Brogden* (1870) L. R. 11 Eq. 188, 190, 40 L. J. Ch. 46; followed in *Jegon v. Vivian* (1871) L. R. 6 Ch. 742, 761, 40 L. J. Ch. 389; *Re*

United Merthyr Collieries (1871) L. R. 15 Eq. 46, 47, n.; *Trotter v. Maclean* (1879) L. R. 13 Ch. D. 574, 586, 49 L. J. Ch. 256; *Livingstone v. Rawyards Coal Co.* (1880) 5 App. Ca. 25, 40.—A. C. (2) 52 R. R. 745 (5 M. & W. 351).

Sir W. W. Follett, for the defendant, contended that the jury were the proper judges of damages, and that, in this case, where there was no imputation of fraud or want of reasonable care and caution on the part of the defendant, they might assess the damages on the principle that the defendant should pay the fair price per acre at which the bed of coal would have been sold to a person who was to be at the expense of getting it.

WOOD
r.
MOREWOOD.

PARKE, B. told the jury that, if they found for the plaintiff, they were to determine what damages should be given: that, if there was fraud or negligence on the part of the defendant, they might give, as damages under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*; but, if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the coal field had been purchased from the plaintiff.

The jury adopted the latter estimate, and found for the plaintiff, damages 210*l.* per acre; 2,310*l.*

No motion for a new trial was made.

SALLY CATTERALL *v.* THOMAS KENYON AND
JANE HIS WIFE.

(3 Q. B. 310—316; S. C. 11 L. J. Q. B. 260; 2 G. & D. 545; 6 Jur. 507.)

1842.
June 1.

[310]

Bailiffs charged to execute process against the goods of J. S. wrongfully took plaintiff's cattle in execution, and lodged them in the stable of an inn kept by defendant K. Plaintiff demanded them of defendant's wife, he being absent: the wife said she would consider, and make inquiry; and, on a subsequent demand, told plaintiff that she was indemnified by the attorney who had issued the process, and that plaintiff need not apply again. The cattle were detained, and sold under the execution, K. continuing absent during the whole transaction. In trover against K. and his wife:

Held, that the above facts were evidence on which a jury might find a conversion by the wife, for which trover lay against both defendants.

TROVER, in the Lancaster Court of Common Pleas, for cows. The declaration alleged that the cows came to the possession of Jane, then and still being the wife of Thomas, by finding, and that she, well knowing *&c., did not, although requested, deliver them to plaintiff, but converted them to the use of Thomas. Pleas: Not

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v.
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guilty; and that plaintiff was not possessed &c. Issues thereon. On the trial, before Rolfe, B., at the Lancaster Spring Assizes, 1841, it appeared that the defendant Thomas Kenyon kept the "Golden Lion" Inn at Blackburn. The cows were taken under an execution against the goods of plaintiff's father, and were brought to the "Golden Lion," where they remained in the stable several days, at the end of which they were sold to satisfy the execution. Thomas Kenyon was absent from home the whole time. While the cows were in the stable, the plaintiff, who alleged that they were not her father's property, but her own, went to the "Golden Lion," and there saw the female defendant, who, on being asked whether she had the cows, admitted that she had. Plaintiff then asked her if she would deliver them up. Defendant said she had nothing to do with delivering them up, and must inquire and consider about it: and, on a second application, made the next day, she said she could not deliver them. Being applied to a third time, on the next day but one, she said she did not care about giving them up if the party making the demand would get a paper (which was understood to mean a written opinion) from Backhouse, an attorney whom the plaintiff had consulted. A paper was accordingly obtained from Mr. Backhouse, and produced to the defendant; but she then said that she had been to Mr. Bell (the attorney who issued the process), and he would save her harmless; and that plaintiff need not come any more. Afterwards the sale took place. On this evidence the defendant's counsel contended that no proof appeared of a conversion by the wife, through *whom only the husband could be affected in this case. The learned Judge left the case to the jury on this point (as well as on the question of ownership), expressing to them his opinion that Jane Kenyon had acted as on behalf of her husband, and that a conversion was proved: but he gave leave to move to enter a nonsuit. Verdict for plaintiff on both issues.

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Alexander, in the next Term, moved according to the leave reserved, and relied upon *Verrall v. Robinson* (1). *Smith v. Young* (2), *Alexander v. Southey* (3) and *Wilson v. Anderton* (4) were likewise referred to. The Court granted a rule *nisi*.

Tomlinson now showed cause:

* * The question then is, whether there was any evidence for

(1) 41 R. R. 780 (2 Cr. M. & R. 495;
S. C. 5 Tyr. 1069).

(2) 1 Camp. 439.

(3) 24 R. R. 348 (5 B. & Ald. 247).

(4) 35 B. R. 348 (1 B. & Ad. 450).

the jury of a conversion. This case differs from *Verrall v. Robinson* (1), because here the defendant Jane Kenyon ultimately took upon herself to forbid any future application, not waiting the result of any thing that was to take place, *but refusing to give up the cattle at all, and so making herself party with the bailiffs. This, if done by a person *sui juris*, would render him liable in trover. To assume the dominion over, and right to dispose of, another person's goods, though without touching them, is a conversion: *M'Combie v. Davies* (2). It makes no difference that the party actually doing the wrong in this case was a married woman. Her conversion was her husband's; if an agency was necessary, she was sufficiently his agent for this purpose; but the ground of his liability is the intendment that a tort done by her is done by him. The declaration alleges that she converted to his use; but this averment is not essential: for the action of trover does not depend upon the acquisition of property by any person charged with the conversion; and on this ground a declaration stating that husband and wife converted "to their own use" was held sufficient after verdict, in *Keyworth v. Hill* (3). Then the doctrine laid down in *Wilson v. Anderton* (4) applies to this case, that, where property is in the hands of a bailee, and the right is disputed, the bailee, if he "makes himself a party by retaining the goods for the bailor, must stand or fall by his title."

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(LORD DENMAN, Ch. J.: I do not think any thing induced us to grant this rule but the case of *Verrall v. Robinson* (1): but there the defendant seems to have been passive; the female defendant here takes upon herself to decide.)

W. H. Watson, contra:

The cattle here were lodged in the stable of an inn: the inn-keeper's wife had no *power to give them up against the will of those who brought them. All the evidence of conversion amounts only to certain words of the female defendant.

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(LORD DENMAN, Ch. J.: Coupled with the act of keeping the cattle.)

(1) 41 R. R. 780 (2 Cr. M. & R. 495; 106. S. C. 5 Tyr. 1069).

(2) 8 R. R. 534 (6 East, 538).

Baldwin v. Cole, 6 Mod. 212, is there cited. See *White v. Teel*, 12 Ad. & El.

(3) Stated 44 R. R. 657, 660 (3 B. & Ald. 685).

(4) 35 R. R. 348 (1 B. & Ad. 450, 456).

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In the cases where an exercise of disposing power over goods has been deemed a conversion, there has been something like an assumption of the right of property ; a mere exercise of dominion for a temporary purpose, without either acquisition or destruction of the chattel, or change of its nature, is no conversion, as was held in *Fouldes v. Willoughby* (1), where the complaint was that the defendant had driven the plaintiff's horses out of a ferry boat in which he was passenger. The present case is the same in principle with *Verrall v. Robinson* (2). * * In *Alexander v. Southey* (3) the defendant, being the servant of an Insurance Company, had goods of the plaintiff under his *charge, in a warehouse where they had been deposited by servants of the Company after saving them from a fire. The plaintiff demanding them, defendant answered that he could not give them up without the Company's order ; and this was held no proof of a conversion. Here, in effect, the defendant makes the same answer ; but the order for delivery cannot be obtained, and she does not give up the cattle.

(PATTESON, J. : In that case the defendant was a servant, and referred the parties to his master.)

LORD DENMAN, Ch. J. :

Verrall v. Robinson (2) does not apply. The learned Judges who decided that case thought that the chattel was in the custody of the law, and that the defendant was not at liberty to give it up. The particular article being attached by process, the defendant held it as servant of the law, and would not have been justified in surrendering it. Here, the officers, being authorized only to seize goods of A. B., had seized the goods of C. D. ; the owner claimed them of the defendant ; and she at first took time for consideration, but ultimately said, " I am told I shall be borne harmless, and I will keep them." That is sufficient to make the husband and wife liable in trover.

PATTESON, J. :

As my Lord observes, in *Verrall v. Robinson* (2) particular goods had been attached in the defendant's hands : the law was to determine whose property those particular goods were ; and the defendant accordingly detained them. Here, an officer, under process, takes goods of a wrong party and lodges them with the defendant ; and,

(1) 58 R. R. 803 (8 M. & W. 540). S. C. 5 Tyr. 1069.

(2) 41 R. R. 780 (2 Cr. M. & R. 495 ; (3) 24 R. R. 348 (5 B. & Ald. 247).

when asked for them, she *says, first, “I will consider of it,” and then “I am told not to give them up; I am borne harmless, and you need not come any more.” That is a very different case. The rule must be discharged.

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WILLIAMS and COLERIDGE, JJ. concurred.

Rule discharged.

ELIZABETH HEDLEY v. BAINBRIDGE (1).

(3 Q. B. 316—321; S. C. 11 L. J. Q. B. 293; 2 G. & D. 483; 6 Jur. 853.)

1842.
June 1, 25.

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The implied authority of one partner to bind another by promissory note or bill of exchange is confined to partnerships for the purpose of trade.

One of two attorneys in partnership has no implied authority to bind his partner by a note in the name of the firm, though given for their debt. As, for money handed to the firm by a client to be laid out on mortgage.

Declaration on a promissory note, with a count on an account stated: Particular of demand, specifying that the action is brought to recover 555*l.* due on the note set forth in the first count, with interest from &c. to the day of payment; and that plaintiff, for recovery thereof, will avail herself of the whole or any part of the declaration: Held, that the note, being invalid, was not, by this particular, made admissible evidence of the account stated.

ASSUMPSIT on a promissory note for 600*l.* made by defendant, payable to plaintiff on demand. Averment that, although part had been paid, defendant had not paid the residue. Counts for money lent, and on an account stated. Pleas: To the first count, that defendant did not make the said note; to the other counts, *Non assumpsit*. Issues thereon.

Particular of demand. “This action is brought to recover the sum of 555*l.* due on the promissory note mentioned and set forth in the first count of the declaration herein, with interest thereon from the 14th day of August, 1840, to the day of payment.

“Above are the particulars of the plaintiff’s demand in this action; for the recovery whereof she will avail herself of the whole or any part of the declaration. Dated,” &c.

On the trial, before Rolfe, B., at the Durham Spring *Assizes, 1841, the facts appeared to be as follows. The defendant and Mr. Spurrier (who died before the commencement of this action) were attorneys in partnership. A Mr. Blagburn, brother-in-law of the plaintiff, and executor of a will under which she was a legatee, had advanced money of the plaintiff to Spurrier, who was acting on behalf of the firm, to be laid out on mortgage. Defendant and

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Spurrier were at that time employed as solicitors in the affairs of the executorship. A settlement of accounts afterwards took place, at which Blagburn, Spurrier and others were present: the balance due in respect of the advances was found to be 723*l.*; and Spurrier, at that time, paid 123*l.* in cash, and drew and delivered a promissory note for the residue. The note was as follows.

“600*l.*

“SOUTH SHIELDS, 14th August, 1839.

“On demand, we jointly and severally promise to pay to Mrs. Elizabeth Hedley, or order, the sum of 600*l.* for value received, with legal interest at 5*l.* per cent. per annum.

“BAINBRIDGE and SPURRIER.”

Spurrier afterwards paid interest on the note, and part of the principal. Defendant was not present at the making of this note; and it did not appear that he ever knew of it, or of the advances or any transaction relating to them, till he was called upon for payment of the note after Spurrier's death. The case on his behalf at the trial was that Spurrier had incurred the debt and given the security without any sanction from him, unless the partnership implied it: and it was contended that an attorney could not, without express sanction, bind his partner by a promissory note. The learned Judge was of this opinion, and directed a non-suit, giving leave to *move to enter a verdict for the plaintiff for 555*l.*, or such sum as the Court should think fit (1). *Alexander*, in Easter Term, 1841, moved for a rule *nisi* accordingly, distinguishing this case from *Greenslade v. Dower* (2), and citing *Gardiner v. Childs* (3). A rule *nisi* was granted.

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W. H. Watson and Otter now showed cause (4):

An attorney cannot render his partner liable by a bill or note without express authority. Partners in a mercantile house may so bind each other; but it is not incident to the business of attorneys. [They cited *Greenslade v. Dower* (2), *Dickinson v. Valpy* (5), *Bramah v. Roberts* (6), and *Bult v. Morrell* (7).]

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Knowles and Hedley, contra :

First, if this be not a valid note, it is evidence of an account

(1) See the reference to the learned Judge's report by PATTESON, J., p. 241, *post*.

(2) 31 R. B. 272 (7 B. & C. 635).

(3) 8 Car. & P. 345.

(4) Before Lord Denman, Ch. J., Patteson, Williams and Coleridge, JJ.

(5) 34 R. B. 348 (10 B. & C. 128).

(6) 3 Bing. N. C. 963.

(7) 54 R. B. 681 (12 Ad. & El. 745).

stated: *Rhodes v. Gent* (1); and the particular of demand gives notice that the plaintiff seeks to recover 555*l.*, and, if not successful on the special count, will resort to the common ones. This calls attention to the latter counts, and the defendant cannot have been misled: and, where that was so, a particular like this was held to let in evidence on a count not framed upon the bill, in *Hay v. Fisher* (2).

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(PARTESON, J.: By the learned Judge's report it seems that he thought the particular confined to the note, and reserved leave to move to enter a verdict only if the Court should think the defendant liable on the note.)

The doctrine as to the power of partners to bind each other by bills and notes has of late been laid down more narrowly than the leading cases warrant. In *Greenslade v. Dower* (3) no actual partnership had commenced; the partnership was yet to be founded, as appears by the language of BAYLEY, J.; and Coleman, the party refusing to be bound, seems to have advanced his share of the purchase money in cash before the bills were drawn. The cases *in which partners have been held incompetent to bind firms by bills or notes have been those of joint stock companies, and chiefly companies for mining, the circumstances of which are peculiar. But in general the power so to bind is incident to the condition of a trading company, and would be useful to a firm of attorneys if they were also scriveners, which, in this instance at least, Spurrier and the defendant appear to have been. It was decided in *Willett v. Chambers* (4) that, if persons are in partnership as attorneys and conveyancers, and either receives money to be laid out on mortgage, giving his separate receipt, both are liable: and in *Rapp v. Latham* (5) the acknowledgment of one partner (in a trading firm) was held to bind his partner in the same manner, though the acknowledgment was untrue. Now, if attorneys receiving money to be laid out for their clients may separately give binding acknowledgments, it seems also fairly incident to such a course of dealing that they may separately give securities. But, further, it must be inferred here, from the relation of the parties and the other facts of the case, that Bainbridge was constructively present at the meetings attended by Spurrier.

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Cur. adv. vult.

(1) 5 B. & Ald. 244.

(2) 2 M. & W. 722, 729.

(3) 31 R. R. 272 (7 B. & C. 635).

(4) 2 Cowp. 814.

(5) 21 R. R. 495 (2 B. & Ald 795).

HEDLEY LORD DENMAN, Ch. J., in the ensuing vacation (June 25th), delivered
 v.
 BAINBRIDGE judgment as follows:

[*321] The defendant and a Mr. Spurrier were in partnership as attorneys. A sum of money was deposited with Mr. Spurrier by the plaintiff, a client of the firm, to be laid out on mortgage: and he gave the plaintiff the promissory *note of the firm for the amount. The question is, whether, under those circumstances, Spurrier had power to bind the firm by such note.

No doubt a debt was due from the firm: but it does not follow that one partner had authority to give a promissory note for that debt. Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange, for it is in the usual course of mercantile transactions so to do; and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments; nor is it necessary for the purposes of their business.

The point does not appear to have been expressly raised, except in the case of *Greenslade v. Dower* (1): and there it was not determined; for the bills were not accepted in the course of partnership transactions, but in the original formation of the partnership, and were drawn at different lengths of time from those agreed upon with the plaintiff.

Upon the whole, we think that the implied authority is confined to partners in trade, and that the nonsuit in this case was right.

It was urged that the plaintiff was entitled upon the account stated: but the form of the particulars excluded him from that count, if the note was not valid; and, besides, that point was not made at the trial.

Rule discharged.

1842.
 June 28.
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REG. v. THE POOR LAW COMMISSIONERS.
 IN THE MATTER OF THE PARISH OF BRIGHTHELMSTON.

(3 Q. B. 325—331; S. C. 3 G. & D. 616.)

If guardians of the poor of a parish, when about to enlarge or rebuild their workhouse in execution of powers given them by a local Act, are required by the Poor Law Commissioners to submit the plans and estimates to them, and refuse to do so, the Commissioners may, under the Poor Law

Amendment Act, 1834 (4 & 5 Will. IV. c. 76), ss. 15, 21, make an order forbidding them to proceed in any alteration or addition to the workhouse, or apply, raise, or borrow any money for that purpose, till the plans and estimates be submitted to and approved by the Commissioners.

REG.
c.
POOR LAW
COMMISSIONERS.

THE directors and guardians of the poor of the parish of Brighthelmston, acting under stat. 6 Geo. IV. c. clxxix. ("local and personal, public") (1), appointed a committee "to consider the recommendation of the visiting committee relative to the erection of a new school-room or the enlargement of the present one, and such further accommodation for the inmates of the workhouse as may be deemed expedient." The committee made a report, recommending that the girls' school should be enlarged, and a new school-room erected for the boys, and that the building on the south side of the workhouse should be enlarged so as to afford greater accommodation, there not being sufficient room for the number generally received in the winter. They submitted plans and a model, with a surveyor's report, and recommended advertising for contracts &c. The directors and guardians resolved that the report should be referred back to the committee to be carried into execution, with power to obtain the necessary specifications, and advertise for tenders. The committee were proceeding to carry the alterations and improvements into effect, and had advertised for tenders, when (December 6th, 1841) the Poor Law Commissioners (2) transmitted to them the following order.

The order bore date December 3rd, 1841, and was addressed to the directors and guardians, the churchwardens and overseers, the clerk or clerks to the justices of the Petty Sessions held for the division or divisions in which the said parish is situate, and to all others whom it may concern. It recited stat. 4 & 5 Will. IV. c. 76, s. 21, as far as the words "subject to the rules, orders, and regulations of the said Commissioners," and then proceeded as follows. "And whereas we, the Poor Law Commissioners, have been informed that the directors and guardians of the poor of the parish of Brighthelmston propose to make certain alterations at or additions to the present workhouse of the parish of Brighthelmston, and have caused certain plans and estimates of expenditure to be made for such additions or alterations, and we have required the said

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(1) "For the better regulating" &c., "and managing" the town of Brighthelmston, in the county of Sussex, and the poor thereof."

missioners are now transferred to the Local Government Board (10 & 11 Vict. c. 109; 34 & 35 Vict. c. 70).—A. C.

(2) The powers of the Poor Law Com-

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directors and guardians to submit the same for our inspection and examination, so that we might express our judgment as to the necessity and propriety thereof, but the said directors and guardians have refused so to do: now, therefore, by virtue of the powers and authorities conferred upon us by the aforesaid Act, we do hereby prohibit and forbid the said directors and guardians from proceeding to carry into effect any alteration or addition to the said workhouse, and from applying, raising or borrowing any money for the purpose of providing for the expense of any such alteration or addition, until the plans and estimates of the expense thereof shall be submitted to the Poor Law Commissioners for inspection and examination, and until the same shall have been approved of by them.

“ Given, &c.” (Signed by two Commissioners.)

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The directors and guardians gave notice to the Commissioners *(pursuant to stat. 4 & 5 Will. IV. c. 76, s. 106) that they should apply for a *certiorari* to remove the order into this Court, on the following grounds.

“ 1. Because you, the Poor Law Commissioners, had no power, jurisdiction or authority to make the said order, the said directors and guardians having been appointed under the provisions of the public local Act 6 Geo. IV. c. clxxix., and having the powers vested in them by that Act. 2. Because the said order is bad on the face of it, and shows no jurisdiction on the part of you the said Commissioners to make the same. 3. Because you, the said Commissioners, had no power, jurisdiction or authority to prohibit and forbid the said directors and guardians from proceeding to carry into effect any alteration or addition to the said workhouse, mentioned in the said order, and from applying, raising or borrowing any money for the purpose of providing for the expense of any such alteration or addition until the plans and estimates of the expense thereof should be submitted to you the said Poor Law Commissioners for inspection and examination, and until the same should have been approved of by you.

“ Dated ” &c. (Signed by the attorney for the directors and guardians.)

Platt now moved (1) for the *certiorari*, on affidavits setting forth the facts and documents, and alleging the reasonableness of the proposed improvements.

(1) Before Lord Denman, Ch. J., Patteson, Williams, and Coleridge, JJ.

Sir F. Pollock, Attorney-General, and *Tomlinson*, showed cause in the first instance (1) :

The order, by its form, shows all that is necessary to give the Commissioners *jurisdiction, if they have power to require persons making alterations in workhouses under local Acts to submit the plans to them, and may inhibit such persons from proceeding till such order is complied with. There is no doubt that the directors and guardians of the poor, appointed under stat. 6 Geo. IV. c. clxxix. s. 199, were competent, under sects. 204 and 205 (2), to cause the works in question to be done, if stat. 4 & 5 Will. IV. c. 76, did not interpose. But the power of control given to the Commissioners generally by sect. 15 of that Act, and with reference to workhouses in particular by sect. 21, fully warrants the interference here exercised. * * *

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Platt and Kelly, *contrà* :

The Commissioners have a power of control: but it does not follow that they can indefinitely prohibit intended proceedings of the guardians, in the manner here attempted, which would enable Commissioners to suspend the whole business of managing the poor, in the various particulars enumerated in stat. 4 & 5 Will. IV. c. 76, s. 15. * * It does not appear on affidavit, though the order so recites, that the Commissioners have in fact called for the plans and estimates. If such documents are demanded and refused, and there is danger that directors or guardians will take some mischievous course while they are withheld, the Commissioners can always apply for a *mandamus* or an injunction; there is no necessity, therefore, that they *should be empowered to issue an order of their own, equivalent to an injunction.

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(COLERIDGE, J. : Suppose the plans were sent to them, and the Commissioners disapproved of the plans, and said that no money ought to be raised for carrying them into effect, should you call that a control or prohibition ?)

(1) See stat. 4 & 5 Will. IV. c. 76, s. 106.

(2) Sect. 204 enacts, "That it shall and may be lawful for the directors and guardians to be appointed by virtue of this Act from time to time, when and as they shall find it necessary, to alter, enlarge, extend, and repair the house already erected for the use of the poor of the said parish of Bright-

helmston, or to erect such other houses or buildings for the better receiving, employing, and maintaining such poor, and to pay for the same out of the rates to be from time to time raised for the relief of the poor of the said parish."

Sect. 205 provides for the purchase of lands by the guardians for the above purposes.

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They might object to the particular plan, as, for instance, in respect of the size or form of the building; but they cannot prohibit the work being done at all till plans are produced. The word "control" in sect. 15 does not enable them to prevent the execution of the local Act altogether.

(LORD DENMAN, Ch. J.: Must they suffer a building to be erected, only that it may be pulled down again?)

No; but they cannot enforce obedience by a prohibitory order like this: they must adopt other means, at law or in equity.

Cur. adv. vult.

LORD DENMAN, Ch. J. in this Term (June 8th), delivered the judgment of the Court:

In this case we think that the order of the Commissioners is good, and that there is no ground for quashing it if brought up by *certiorari*. It was suggested in argument that, if the order to submit plans were disobeyed, the Commissioners must be left to their remedy by *mandamus* or injunction: but we think that neither course is contemplated by the Poor Law Amendment Act, and that the case is not one in which the law imposes the necessity of either. The rule, therefore, must be discharged.

Rule discharged.

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REG. v. BARNES AND ANOTHER.

(3 Q. B. 437—440; S. C. 11 L. J. M. C. 128; 2 G. & D. 233; 6 Jur. 945.)

Where the Sessions have quashed or confirmed an order subject to a case, and the Court of Queen's Bench, on argument, sends back the case to be restated, it is the duty of those contesting the original order to give notice to those who support it, before proceeding to have the case reheard.

And, where an order had been so quashed, and the case stated and sent back, and the respondents, without giving notice of trial, attended the Sessions, and, in the absence of the appellants, obtained a confirmation of the order, this Court, on *certiorari*, quashed the last mentioned order, though the respondents had given the appellants notice of the order of this Court sending the case back for restatement.

On appeal against an order of justices upon surveyors of highways for payment of a portion of the highway rate to certain trustees of a turnpike road (1), the Quarter Sessions (for Derbyshire) quashed the order, subject to the opinion of the Court of Queen's

(1) See stat. 2 & 3 Vict. c. 81 (r. S. L. R. (No. 2) 1874).

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Bench upon a case. The case was stated, and argued in this Court in Michaelmas Term, 1841; when the Court made a rule that the orders should be sent back to be restated. The respondents did not apply to the appellants for a meeting to restate the case, nor give them any notice of an intention on the respondents' part to bring the matter before the next Quarter Sessions; nor did the appellants, in fact, know of such intention; but at the January Sessions, 1842, the respondents moved (no one appearing on behalf of the appellants) that the original order might be confirmed; which was done by an order reciting the previous proceedings, and the non-appearance of the appellants. In last Easter Term a *certiorari* was obtained to bring up this order of Sessions, for the purpose of its being quashed.

The attorney for the appellants, in his affidavit made in support of the rule, declared his belief that it was incumbent on the respondents, who had originally brought the case into this Court, to give notice of their intention to proceed for a restatement, and deposed that, if such notice had been given, he should have instructed counsel to appear at the Sessions. The affidavits in opposition stated that an agent for the appellants was present *in the Court of Queen's Bench when the rule was made for sending the case back to be restated, and that the appellants were served with a copy of that rule: that the attorney for the respondents attended at the January Sessions with his counsel, documents and witnesses, having done all that was previously necessary, as he was advised and believed, for the purpose of procuring the restatement: and that, at a late period of the Sessions, the appellants not then appearing, he moved to have the original order confirmed. That the attention of the Court was then called to the law and practice on cases sent for restatement, and to decisions in the Court of Queen's Bench on that subject: "and it was thereupon suggested by the Court, whether a notice of the intended application should not have been given by the respondents to the appellants: and, after discussion thereupon, the Court considered, and intimated its opinion, that, if any notice was necessary according to law and the practice of that Court, it should have been given by the appellants to the respondents, or that the appellants ought to have appeared: and the Court thereupon confirmed without reservation or condition the original order of justices." The last mentioned order of Sessions being brought up and a motion made to quash it,

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Wildman and Griffin now showed cause :

It was not necessary that the Sessions should restate the case. Their duty was to rehear ; and upon so doing they might decide as they thought fit. *Rex v. The Earl of Effingham* (1), and *Rex v. Bloxam* (2), and the *Anonymous* (3) case there cited by Sir J. SCARLETT, show the practice.

[439] (LORD DENMAN, Ch. J.: Will it be contended that, when the case was sent back, the Sessions were bound at all events to state a new case? The evidence on the rehearing might remove every difficulty.)

(*Clarke and Whitehurst*, in support of the rule, stated their objection to be, not that suggested, but that the respondents ought to have given notice of trial.)

This Court will not quash an order of Sessions which is good on the face of it, and relates to a point of practice which they had authority to decide.

(LORD DENMAN, Ch. J.: It is said that they have applied their rule of practice unjustly.)

The injustice ought to be very manifest to warrant an alteration of their order ; but here the appellants suffered by a default of their own. They should have been ready to proceed at the Sessions. Their agent was present in this Court when the rule was made for sending back the case to be restated. It was not necessary even to serve them with a copy of the rule. *Rex v. The Justices of Monmouthshire* (4), *Rex v. The Justices of Leicestershire* (5), and *Rex v. James* (6), show that, in a case like the present, this Court ought not to assume the jurisdiction of reviewing the judgment of the Sessions. The Court has refused to interfere, even where the chairman had, by mistake (not discovered till the close of the Sessions), pronounced judgment for quashing, instead of confirming, an order, and the justices themselves supported the rule for a *mandamus* to rehear, or to correct the judgment by the chairman's notes : *Anonymous* (7) case in note to Dickinson's Guide to the Quarter Sessions.

(1) 36 R. R. 606, n. (2 B. & Ad. 393,
note (a)).

(2) 1 Ad. & El. 386.

(3) 1 Ad. & El. 389.

(4) 32 R. R. 356 (8 B. & C. 137).

(5) 14 R. R. 494 (1 M. & S. 442).

(6) 2 M. & S. 321.

(7) Dick. Quart. Sess. 661, note (z),
5th ed., by Talfourd.

Clarke (with whom was *Whitehurst*), *contra* :

If neither party had taken any step, the order of Sessions, quashing the original order, would have stood. The appellants had no interest in moving the case. It, therefore, lay upon the respondents to give notice of the proceeding at Sessions.

(He was then stopped by the Court.)

LORD DENMAN, Ch. J. :

The principle laid down is a just one. The party who, in the first instance, succeeded at Sessions is not bound to stir the case for the purpose of having the order of Sessions reviewed. The question whether the appellant, in ordinary cases, ought to give notice, does not apply here. As to quashing the order now brought before us by *certiorari*, that is the substance of every application of this kind.

PATTESON, WILLIAMS, and COLERIDGE, JJ. concurred.

Rule absolute, without costs.

RUSSELL *v.* SHENTON (1).

(3 Q. B. 449—459; S. C. 11 L. J. Q. B. 289; 2 G. & D. 573; 6 Jur. 1059.)

The cleansing and repairing of drains and sewers is *primâ facie* the duty of him who occupies the premises, and does not devolve upon the owner, merely as such.

Therefore a declaration in case for omitting to cleanse and repair drains and sewers, whereby the plaintiff's adjacent premises suffered damage, is bad on general demurrer if it charge the defendant as the "owner and proprietor" of such drains and sewers, unless it also allege some ground of liability.

The words "owner and proprietor" do not necessarily import that the party is occupier.

CASE. The declaration stated that plaintiff, before and at the time of the committing of the grievances &c., was lawfully possessed of a dwelling-house and premises wherein plaintiff and his family during all the time aforesaid inhabited and dwelt: that defendant before and at the time &c. was the owner and proprietor of divers drains and sewers, to wit &c., situate and being in and upon certain premises belonging to defendant, near to and adjoining the said dwelling-house and premises of plaintiff, into and

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(1) Approved in *Humphries v. Cousins* (1877) 2 C. P. D. 311, 313, 46 L. J. C. P. 675.—A. C.
(1877) 2 C. P. D. 239, 245, 46 L. J. C. P. 438; *Nelson v. Liverpool Brewery Co.*

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through which drains and sewers divers quantities of soil, filth and water from time to time passed and flowed, and by reason thereof defendant, as such owner and proprietor as aforesaid, during all the time aforesaid, ought from time to time well and sufficiently to have kept cleansed and repaired the said drains and sewers, and to have continually hindered and prevented the soil, filth and water so from time to time passing and flowing into and *being in the said drains and sewers from unduly accumulating therein, and from running and proceeding therefrom unto or into the said dwelling-house of plaintiff: nevertheless defendant, well knowing &c., but disregarding his duty in that behalf, and wrongfully and unjustly intending &c., on &c., and on divers other days &c., wrongfully suffered the said drains and sewers to become foul and in bad repair, and also wrongfully suffered divers large quantities of soil &c. unduly to accumulate therein, and wrongfully kept and continued the said drains and sewers so foul and in bad repair &c. for a long space of time, to wit &c.; and by reason thereof &c. divers large quantities of the said soil, &c., then ran and flowed therefrom unto and into the said dwelling-house &c., and thereby then caused divers unwholesome smells &c., and the walls &c. of plaintiff's dwelling-house became decayed &c., to the damage &c.

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Plea 5 was, in substance, that defendant was the owner and proprietor of the said drains and sewers, &c., and of the land, &c., in and upon which they were constructed, that is to say of the reversion of and in the said drains, sewers, land, &c., expectant on the determination of the demises after mentioned: that, before any of the said several times when, &c. he had demised the said drains, sewers, land, &c., to certain tenants for terms which were still subsisting; and the said tenants, before and at the said times when &c., were in the possession and occupation of the said drains, &c., and land, exclusively, and were, as such tenants, liable to cleanse and repair &c.; and defendant was not in possession, and could not lawfully enter to cleanse and repair &c. Verification.

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The plea was specially demurred to, on grounds *which it is unnecessary to state. The defendant also delivered a statement of objections to the declaration. The substance of these will appear sufficiently from the argument. The demurrer was argued in the last Term (1).

(1) May 31st. Before Lord Denman, Ch. J., Patteson, Williams, and Coleridge, JJ.

Butt, for the defendant (1) :

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The declaration is bad. It alleges that defendant is owner and proprietor of drains and sewers, and assigns as a breach his omission to cleanse and repair them : that is an obligation which the law casts upon the occupier, not the owner ; and, though cases may exist in which it is cast upon the owner, that is not a *primâ facie* obligation on which a plaintiff can declare generally. "Owner and proprietor" cannot mean "occupier" ; and, if those words imply seisin in fee, the nature of the obligation ought to be set out in the declaration.

(COLERIDGE, J. : On general demurrer do not the words mean "legal owner" ?)

They cannot mean seisin in fee.

(COLERIDGE, J. : In Acts of Parliament where both terms are used, the expression "owner and proprietor" is sometimes used as opposed to the word "occupier." On general demurrer may not the word "owner" mean "owner in fee" ?)

LORD DENMAN, Ch. J. : Lord ELLENBOROUGH objected very strongly to the use of the expression "owner and proprietor" in an indictment which charged the defendant with liability to repair a bridge by reason of ownership (2.)

Assuming the expression to be equivalent to an allegation of seisin in fee, the declaration is bad for not alleging that the defendant was also *occupier. In case (3) against tenant in fee for non-repair of fences, Lord KENYON held it clear that the action could not be maintained against the owner of the inheritance, when the land was shown by evidence to be in the possession of another : and BULLER, J. distinguished the case from *Rosewell v. Prior* (4), which was an action against the owner, not in possession, for a nuisance in making an erection which stopped ancient lights, because "there the owner let the premises with the nuisance complained of, which had been before erected upon them. That therefore was a misfeasance of which he himself had been guilty ; and, say the Court, his demise affirmed the continuance of the

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(1) The defendant's counsel was heard first, the plaintiff's counsel not objecting.

(2) *Rez v. Kerrison*, 14 R. R. 491

(1 M. & S. 435).

(3) *Cheetham v. Hampson*, 2 R. R. 397 (4 T. R. 318).

(4) 2 Salk. 459, 460.

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nuisance, and therefore might be said to be a continuation of it by himself." In the present case the declaration does not show that the defendant had the power to cleanse, or was under any obligation to repair: the common law obligation is on the occupier; if any other obligation exists in the particular case, the declaration ought to be specially framed to meet it. The forms in Chitty on Pleading⁽¹⁾ state the defendant to be in possession. Several authorities are cited in Com. Dig. Action upon the Case for a Nuisance, (B), to the effect that, if one erect a nuisance and demise the land, and the nuisance continue, the landlord may be charged for erecting, and the tenant for continuing it. *Brent v. Haddon* (2) shows the tenant's liability: but the landlord would not be liable for the continuance unless on some special obligation, which must be pleaded specially.

(COLERIDGE, J. referred to *Thompson v. Gibson* (3).)

[*453] There, the defendants having erected on *the land of a corporation of which they were members a building which was a nuisance to a market, the lord of the market afterwards demised the market to the plaintiff, who recovered against defendants for the continuance of the nuisance, though they had no right to enter upon the land to remove it. That was an affirmative act: the one now in question was a mere omission.

(COLERIDGE, J.: Suppose the owner suffered the soil in his drains to accumulate, and then demised them; would he not be liable?)

He might be charged as occupier for every thing which he did previous to the demise.

(COLERIDGE, J.: Then suppose the plaintiff's possession to commence after the accumulation has happened: cannot he sue for continuance of the omission?)

Thompson v. Gibson (3) decided only that the person who originally commits the nuisance is chargeable for the continuance of it: in the present case the declaration does not allege that the defendant whilst occupier permitted the accumulation but it charges him generally

(1) Vol. 2, pp. 585—587, 7th ed.

Bowles, Cro. Jac. 373.

(2) Cro. Jac. 555. See *Ryppon v.*

(3) 56 R. R. 762 (7 M. & W. 456).

on a common law obligation, as owner and proprietor, to prevent the accumulation. If this case had gone to trial, the Judge, on proof that the accumulation took place while defendant, though seised in fee, was not in possession, but whilst other persons were, must, according to the authority of *Cheetham v. Hampson* (1), have ruled that the obligation did not attach upon him. If, however, the declaration, on general demurrer, must be taken *primâ facie* to mean that the defendant was in possession, then the plea is good; because it shows that others were in fact in possession, upon whom the direct obligation to cleanse and repair attached.

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E. James, contra :

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The only question is, whether the declaration be bad on general demurrer; that is, whether, under any supposable circumstances, the defendant may be liable. *Cheetham v. Hampson* (1) shows only that the occupier is the party *primâ facie* liable. In *Tenant v. Golding* (2) the plaintiff complained that a wall, part of the defendant's house, which the defendant *debut et solebat reparare*, was out of repair, by reason whereof filth ran from defendant's premises into plaintiff's; and it was alleged, in arrest of judgment, "that this being a charge laid upon the owner himself, the plaintiff should have showed a title by prescription; *sed non allocatur*, for it is a charge laid on the defendant of common right, which by law he is subject to" (3). In *Payne v. Rogers* (4) (where *Cheetham v. Hampson* (1), was cited) it was held that, although the tenant was *primâ facie* bound to repair, and therefore liable for a damage caused by non-repair, "yet, if he could show that the landlord was to repair, then that the landlord was liable." Here it is not to be assumed that, on an issue in fact, such liability in the landlord would not have been proved. The premises might have been untenanted. *Rosewell v. Prior* (5) shows that the defendant, even if he had demised, which, however, does not appear by the declaration, might have been subject to liability, as here alleged, for not cleansing and repairing. A tenant at will would not have been bound to cleanse *drains and repair outer walls. The owner might have agreed to do these works.

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(1) 2 R. R. 397 (4 T. R. 318).

(2) 1 Salk. 21.

(3) *Butt* here referred to the report of *S. C.* (as *Tenant v. Goldwin*), 1 Salk. 360, and to the record, set out in 2 Salk. 770, and in *Tenant v. Goldwin*, 2 Ld.

Ray. 1089 (and see 3 Ld. Ray. 324), as showing that nothing was charged against the defendant, in that case, inconsistent with a mere possession.

(4) 3 R. R. 415 (2 H. Bl. 349).

(5) 2 Salk. 460, pl. 6.

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(PATTESON, J.: I do not understand what is meant by "owner and proprietor" in the declaration.)

It is a term often used in Railway Acts.

(PATTESON, J.: In *Rex v. Sutton* (1) the defendant was said to be liable as owner and occupier; but that was a charge of liability to repair a bridge, *ratione tenuræ*. I do not know any instance of a person being charged, as owner, with liability to such repairs as are mentioned here. If the defendant were so liable, it must be not as owner but by some contract with the occupier.

COLERIDGE, J.: And, although such a contract might have effect as between the contracting parties, I should think that, as to other persons, the landlord, if liable, must be so as owner.)

The judgments in *Payne v. Rogers* (2) and in *Rex v. Pedly* (3) seem to show that the owner, as such, may take the liability on himself.

(COLERIDGE, J.: It would be difficult to say that a contract between the landlord and tenant could give third persons a right to sue the landlord.)

It might be evidence on a count charging him as owner; and such evidence would support the form of allegation used here, that defendant was the owner &c., and "by reason thereof" ought to have cleansed and repaired: *Boyle v. Tamlyn* (4), judgment of BAYLEY, J. (5). It would seem from the language of the Court in *Rex v. Kerrison* (6) that the term ownership extended to every kind of interest, including that of an occupier.

Butt, in reply:

[*456] If a tenant at will would not have been bound, as between him and his landlord, to do *the works in question, still he would have been liable to third persons for a nuisance arising from an omission of them during his tenancy. "By common law, he who has the use of a thing ought to repair it:" Lord MANSFIELD in *Taylor v. Whitehead* (7). The same doctrine is stated in note 3 to *Pomfret v. Ricroft* (8). In this case, therefore, it ought to have appeared

(1) 42 R. R. 490 (3 Ad. & El. 597).
See *Baker v. Greenhill*, ante, p. 173.

(2) 3 R. R. 415 (2 H. Bl. 349).

(3) 40 R. R. 444 (1 Ad. & El. 822).

(4) 30 R. R. 343 (6 B. & C. 329).

(5) P. 338.

(6) 14 R. R. 491 (1 M. & S. 435;
see p. 437).

(7) 2 Doug. 745, 749.

(8) 1 Wms. Saund. 322 a.

that the party charged was he who had the use. In *Payne v. Rogers* (1) the declaration itself seems to have shown that the house was occupied by a tenant; probably, therefore, it alleged some ground on which the owner was liable.

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(PATTESON, J. : If a declaration alleged seisin in fee, that would *primâ facie* imply occupation : *Bullard v. Harrison* (2). But is an allegation of ownership equivalent to a statement of seisin in fee ? The uncertainty of the terms " owner and proprietor " is dwelt upon in *Mr. Abbott's* argument for the defendant in *Rex v. Kerrison* (3).)

No instance can be found in which so loose a mode of statement has been held sufficient, at least before verdict. In *Tenant v. Golding* (4) the point now taken was not raised ; and that was a case on judgment by default.

Cur. adv. vult.

LORD DENMAN, Ch. J., in this vacation (June 25th), delivered the judgment of the Court :

This was an action for nuisance to the plaintiff's lands by reason of the foul state and bad repair of drains of which the defendant is the owner and proprietor, situate on his land adjoining that of the plaintiff, *and which the defendant, as such owner thereof, ought to repair. The plea was demurred to ; but the defendant took exceptions to the declaration.

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It charges no act on the defendant, either of making or continuing the nuisance. It merely states him to be the owner and proprietor of the drains, and seeks to cast upon him, as such, a legal obligation to make good the damage ensuing to his neighbour from their foul condition. There is no authority in support of such a claim, but several against it : *Brent v. Haddon* (5), *Cheetham v. Hampson* (6), *Boyle v. Tamlyn* (7). The plaintiff also argued that the statement of the defendant's being owner and proprietor involved his being also occupier ; for which he relied on some expressions used by the Judges of this Court in *Rex v. Kerrison* (3), as showing that an averment that a person is owner and proprietor is equivalent to averring that he is seised ; which

(1) 3 R. R. 415 (2 H. Bl. 349).

(2) 16 R. R. 493 (4 M. & S. 387).

See *Stott v. Stott*, 14 R. R. 354 (16 East, 343) ; *England v. Wall*, 10 M. & W. 699 ; *Johnson v. Faulkner*, 2 Q. B. 925.

(3) 14 R. R. 491 (1 M. & S. 435).

(4) 1 Salk. 21, 360.

(5) Cro. Jac. 555.

(6) 2 R. R. 397 (4 T. B. 318).

(7) 30 R. R. 343 (6 B. & C. 329).

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latter term was said, in *Bullard v. Harrison* (1), *primâ facie* to import that he is in possession and occupation. If ownership imports occupancy, and occupancy creates the duty, it would seem but reasonable to require occupancy to be pleaded in direct terms. But those expressions of Lord ELLENBOROUGH and the Judges must be taken with reference to the case in which they were employed, and do not show more than this, that the averment was equivalent to averring that the party had the whole interest, not that he was seised, which is a word of technical import. We cannot consider it as an assertion of that actual occupation, which is necessary to charge the defendant, but by no means follows as matter *of law from his ownership or property in it. The words themselves are in some degree ambiguous; but, in whatever sense used, they do not necessarily import occupation, and are used in this declaration evidently in contradistinction to "occupier."

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Tenant v. Goldwin (2) was cited for the plaintiff; but plainly it was assumed in that case that the defendant was occupier as well as owner of the adjoining house. The record is not set out (3); but the declaration averred that the defendant *debut et solebut* to repair the wall separating his privy from the plaintiff's cellar, and that the filth came from it into the cellar for want of such reparation. HOLT says, "it was the defendant's wall and the defendant's filth." The present declaration contains no averment that the defendant occupied, or that he did any act to the plaintiff's annoyance. *Payne v. Rogers* (4) was also quoted. The language of the Court is not very clear in that case; but, if the marginal note may be taken as a fair representation of the effect of the decision, it will be hard to reconcile with *Cheetham v. Hampson* (5). "If the owner of a house is bound to repair it, he, and not the occupier, is liable to an action on the case for an injury sustained by a stranger from the want of repair." But the Court intended by the owner's being bound to repair an obligation as between him and the occupier. The CHIEF JUSTICE and BULLER, J. expressly hold the occupier *primâ facie* liable: if so, this declaration is defective in not showing how that liability is taken out of the occupier and transferred to the owner. *Rex v. Peddy* (6) was an indictment against *the owner of houses and privies, which had been built for the very purpose of being so used as to create a nuisance unless

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(1) 16 R. B. 493 (4 M. & S. 387).

(2) 1 Salk. 21, 360.

(3) But see 2 Salk. 770.

(4) 3 R. B. 415 (2 H. Bl. 349).

(5) 2 R. B. 397 (4 T. R. 318).

(6) 40 R. B. 444 (1 Ad. & El. 822).

the owner took effectual means to prevent it. Those means not having been adopted, the owner, who received rents for both, was held liable for the public nuisance which arose, not from a single privy, but from the whole assemblage of them. The Court expressed no dissent from the cases cited, which were the same as have been adduced, on this argument, for the defendant.

The declaration is therefore bad.

Judgment for defendant.

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HOGGINS, LEARY, AND BAGSHAW, v. GORDON AND OTHERS (1).

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(3 Q. B. 466—475; S. C. 11 L. J. Q. B. 286; 2 G. & D. 656; 6 Jur. 895.)

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Declaration in assumpsit alleged that, before the promise &c., a cause, wherein the now defendants were plaintiffs and G. was defendant, was referred by Judge's order to the award of plaintiffs A. and B., and such third person as they should appoint in writing, or any two of them: that afterwards, and before the promise &c., by a writing dated 5th January, 1841, A. and B. appointed plaintiff C. to be the third arbitrator: that defendants afterwards, in consideration that plaintiffs, at the request of defendants, would take upon themselves the burthen of the reference, promised plaintiffs to pay them their reasonable costs of the said award as they should by their said award appoint: that plaintiffs accepted the burthen &c., and, within the time limited, made their award ready to be delivered to the parties, and thereby awarded, amongst other things, that defendants should pay plaintiffs a certain sum for their costs, the said sum to be paid to plaintiffs immediately after the execution of the award, whereof defendants afterwards had notice: nevertheless, though the sum was a fair sum, and a reasonable time had elapsed before the commencement of the suit, defendants had not paid.

Held, on special demurrer, that an express promise would be intended, and therefore the action was maintainable:

That the consideration as alleged was sufficiently definite, being the undertaking by plaintiffs of a known duty:

That the award directing payment of costs "immediately after the execution of the award" must be construed to mean "within a reasonable time after notice:"

That the contract was joint. ✓

ASSUMPSIT. The declaration stated that, before the making of the promise &c., a cause was depending in the Court of Common Pleas, wherein the now defendants were plaintiffs and James Gawen was defendant. And, before &c., to wit on &c., by a certain order *then made by Sir Thomas Coltman, Knight, then being one of the justices &c., the said Sir T. C. did, with consent of the now

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(1) Cited in *Crampton v. Ridley & Co.* (1887) 20 Q. B. D. 48, 53.—A. C.

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defendants and the said James Gawen, order that all matters in difference &c. should be referred to the award &c. of plaintiffs Hoggins and Leary, and such third person as they should by writing under their hands appoint in that behalf, or of any two of them, so as they or any two of them should make and publish their award in writing &c., ready to be delivered to the said parties in difference, or such of them as should require the same, on or before &c. : with provisions for enlarging the time, signing judgment, and for the costs of the cause: that the costs of the reference and award should be in the discretion of them the said arbitrators, or any two of them: powers to examine parties and witnesses; provisions that actions or suits should not be brought against the arbitrators, for the prevention of affected delays, for the order to be made a rule of the Court of Common Pleas, and for giving the then defendants time to pay any balance. That afterwards, and before the making of the promise &c., by a memorandum in writing, dated the 5th January, &c., under the hands of plaintiffs Hoggins and Leary, and made before Hoggins and Leary entered on the said matters in difference, Hoggins and Leary did duly nominate plaintiff Bagshaw to be the third arbitrator, to whom, together with them &c. the matters &c. should be referred, according to the tenor &c. : of all which premises defendants then had notice. And thereupon defendants afterwards, to wit on &c. in consideration that plaintiffs, at the request of defendants, would take upon themselves the burthen of the reference, undertook and promised plaintiffs to pay *them their fair and reasonable costs of the said award in such manner and at such time as plaintiffs, as such arbitrators, should by their said award in writing direct and appoint. That plaintiffs, confiding &c., did then accept and take upon themselves the burthen of the reference, and did afterwards, to wit on &c., and on divers other days &c., proceed in and with the said reference, and hear, examine, and consider &c., and did afterwards, and before &c., duly make and publish their award in writing under their hands of and concerning the matters in difference so referred to them, ready to be delivered to the said parties in difference, and did thereby, amongst other things, award, order and direct that the costs of the said award of plaintiffs, amounting to 191*l.* 19*s.*, should be in the first instance paid to plaintiffs by the now defendants immediately after the execution of the said award; but that the sum of 95*l.* 19*s.* 6*d.*, being one moiety or equal half part thereof, should be repaid by the said James

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Gawen to the now defendants at the expiration of twelve months from the date of the said order : whereof defendants afterwards, to wit on &c., had notice. Yet defendants, not regarding &c., did not nor would pay plaintiffs the said sum of 191*l.* 19*s.* &c., or any part thereof, although the said sum &c. was the fair and reasonable costs of the plaintiffs of the said award, and although a reasonable time for the payment thereof had elapsed before the commencement of the suit ; but had wholly neglected &c.

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Special demurrer. The grounds insisted upon will appear sufficiently from the argument. Joinder.

The case was argued in last Term (1).

Bovill for the defendants :

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An arbitrator cannot maintain an action on an implied promise to pay the costs of arbitration : *Virany v. Warne* (2), which seems to be the case alluded to in *Burroughes v. Clarke* (3) by TAUNTON, J., who says that Lord KENYON had ruled “that the office of arbitrator was altogether honorary, and that an arbitrator could not maintain an action for his fees :” and the general practice is in accordance with this view. An arbitrator has two remedies : he may retain the papers till his fees are paid ; or he may move for an attachment for the contempt in refusing to pay them : *Hicks v. Richardson* (4).

(PATTESON, J. : In *Swinford v. Burn* (5) DALLAS, Ch. J. expressed an opinion that an arbitrator may recover compensation for his trouble.)

This declaration is framed as on a special contract, but is defective. First, the consideration, as laid “that plaintiffs, at the request of defendants, would take upon themselves the burthen of the reference,” is indefinite and without value. A promise to forbear some little time is no consideration : Roll. Abr. 23, Action sur Case (V), pl. 25, 26 ; nor a promise to forbear for an indefinite time : *Phillips v. Sackford* (6) ; nor to pay in a short time : *Tolhurst v. Brickenden* (7).

(LORD DENMAN, Ch. J. referred to *Hardres v. Prowd* (8).)

(1) Friday, June 3rd. Before Lord Denman, Ch. J., Patteson, Williams, and Coleridge, JJ.

(2) 6 R. B. 839 (4 Esp. 47).

(3) 36 R. B. 814 (1 Dowl. P. C. 48, 50).

(4) 4 R. B. 768 (1 Bos. & P. 93).

(5) Gow, 7.

(6) Cro. El. 455 ; S. C., as *Sackford v. Phillips*, Moore, 689.

(7) Cro. Jac. 250.

(8) Style, 465.

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In that case the promise was on an executed consideration.

(LORD DENMAN, Ch. J. : Suppose it had been said, I will give you 1,000*l.* if you will go to York ?)

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That is definite: here it is as if one had said, I will give you 1,000*l.* if you will go on the road towards York. A promise to “take upon themselves the burthen” of the reference is *not a promise to investigate or to carry out the investigation to an award, or to make an award of any thing but costs; or, if something more is to be intended, the statement is too vague: *Figes v. Cutler* (1).

(COLERIDGE, J. : That was a case upon evidence of a contract for a partnership: without knowing the terms the jury could not find any value.)

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The rule is as stated in Chitty on Contracts, p. 78 (2): “But in order to constitute a valid parol or written agreement, the parties must express themselves in such terms that it can be ascertained, to a moral or reasonable degree of certainty, what they mean. And if an agreement be so vague and indefinite, that it is not possible to collect the full intention of the parties, it is void; for neither the Court nor jury can make an agreement for the parties.” Secondly, the promise, as laid, is inconsistent with the order of reference: the promise is to pay such reasonable costs as plaintiffs by their said award in writing direct; whereas, according to the terms of the submission, the award of costs was to be made by the three plaintiffs or any two of them. Thirdly, the plaintiffs have no joint right of action: each ought to have sued for his own proportion: the appointments were several; the labour of each was several; and an award by any two would have been sufficient. Fourthly, the promise is to pay costs as directed by the award: and the award directs payment immediately after the execution of the award, which is an impossibility created by plaintiffs’ own act. The declaration indeed alleges that the defendants had notice, and that a reasonable time had elapsed: but, assuming the construction of the award, to which this allegation seemingly points, to be fair, it is not alleged that defendants were *ever requested to pay: that is always necessary when the omission complained of is something which ought to have been done in a reasonable time: 1 Chitty on Pleading, p. 340 (3), *Bach v. Owen* (4). Fifthly, there is nothing

(1) 3 Stark. N. P. C. 139.
 (2) 3rd ed. (1841).

(3) 7th ed.
 (4) 5 T. R. 409.

to show that any party had benefit from the award : it is not even alleged that the award was of any thing but costs. Sixthly, there is no sufficient statement of the time at which the third arbitrator was appointed, which, as the allegation is material, vitiates the declaration.

Peacock, contra :

First, as to the sufficiency of the consideration. The declaration shows an express contract; the remedies which have been suggested on the other side show the legality of such a contract. The cases cited for the defendants turned on the circumstance that time, being of the essence of the consideration, was not ascertained, not on its inadequacy when ascertained, however short it might have been. In *Chitty on Contracts*, p. 32 (1), it is said, citing (besides other authorities) *Wilkinson v. Oliveira* (2), that it is immaterial that the detriment or charge assumed is in fact of the most trifling description, provided it be not utterly worthless in fact and in law. *Travers v. —* (3) illustrates this. It is well established that the Court on demurrer will not look into the question whether the consideration is adequate (4). Neither is it any objection that the plaintiffs were not compellable to perform their undertaking.

(PATTESON, J. : The promise never attaches if they do not make an award.)

There are *many cases in which the consideration is not obligatory, but in the nature of a condition precedent : the consideration here is similar to that proved in *Payne v. Wilson* (5), where, the plaintiff having, at defendant's request, consented to suspend proceedings against A., defendant promised to pay a sum of money on a certain day. The objection that the consideration, as stated, is too vague is not well founded : the allegation that plaintiffs were to take upon themselves the burthen of the reference imports that they were to perform all the duties of arbitrators. *Com. Dig. Arbitrament* (I. 6) citing *Rose v. Spark* (6), shows that these instruments shall have a reasonable intendment. An award of nothing but costs would be no award at all ; but the costs are to be the costs of the "said

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(1) 3rd ed. (1841).

(2) 1 Bing. N. C. 490.

(3) 1 Sid. 57.

(4) See *Hitchcock v. Coker*, 45 R. R. 522 (6 Ad. & El. 438, 456); *Haigh v.*

Brooks, 50 R. R. 399 (10 Ad. & El. 309); *Skeate v. Beale*, 52 R. R. 558 (11 Ad. & El. 983, 992).

(5) 7 B. & C. 423.

(6) *Aleyn*, 51.

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award," by which must be intended a valid award under the submission. This is an answer also to the objection that there is no averment of any award having been made but an award of costs. Next, as to the objection that the award to pay money immediately involves an impossibility. It is usual to award money to be paid "immediately" or "forthwith;" and these expressions are always construed to mean "in a reasonable time" (1). As to the delivery of the award, there is an averment that plaintiffs were ready to deliver it, which is sufficient. As to the objection that there is no averment of defendants having been requested to pay the money, there is an averment that defendants had notice: it is not necessary to request a party to pay a debt which is due from himself: there "the bringing of the action is a sufficient request; but otherwise it is upon a promise to pay a collateral sum *upon request:" *Birks v. Trippet* (2); and this is the principle of *Gibbs v. Southam* (3). The present is the common case of a contract for work and labour to be paid for by the parties for whom it is to be performed. Lastly, as to the objection that the time at which the third arbitrator was appointed is not sufficiently stated. It is laid "afterwards and before the making of the promise;" and the appointment is alleged to have been in writing bearing date 5th January, 1841: the writing, if necessary, will be intended to have been made on that day. But the time need not be laid. * * *

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Bovill, in reply. * * *

LORD DENMAN, Ch. J., in this vacation (June 25th), delivered the judgment of the Court:

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This was an action for work and labour, by two arbitrators and an umpire, against the defendants, whom their award required to pay the costs of the reference, these costs being left in their discretion. Numerous objections were taken on special demurrer.

One of them was that such an action will not lie, as the remuneration of an arbitrator, like that of a physician or barrister, is left to the option of his employers, and cannot be enforced. But it was properly admitted, in the argument, that, where there is an express promise to pay, such an action may be maintained.

But the consideration was said to be badly alleged in these terms; in consideration that the plaintiffs "would take upon themselves

(1) See judgment of LITTLEDALE, J.
in *Gibbs v. Southam*, 5 B. & Ad. 913.

(2) 1 Saund. 32, 33 a.
(3) 5 B. & Ad. 911.

the burthen of the reference." We are however of opinion that these are intelligible words, and describe a known duty, the non-performance of which would excuse the defendants from paying, but which is averred, and not denied, to have been performed by proceeding to hear and award upon the matters in dispute.

Another point was, that the award of these costs is altogether bad, requiring the defendants to pay them immediately after the execution of the award. But we think that words of this nature must be construed with a reasonable allowance. The costs became payable on notice to the defendants; and such notice is averred.

A more substantial objection seemed to be that there is no joint right in these plaintiffs to sue the defendants for the costs. The order of reference named the two arbitrators, and gave them power to nominate an umpire: and they in the first place proceeded to nominate the plaintiff thirdly named, of which it is averred that defendants had notice, and made their promise to all three *to pay them their fair and reasonable costs in consideration of their taking upon them the burthen of the reference. The plaintiffs then agreed to act jointly; and the defendants promise to them jointly to pay them costs. They aver a joint performance of their promise, and an award by all that they should pay to all. This is clearly a joint contract.

Judgment for plaintiffs.

REG. v. HARVEY (1).

(3 Q. B. 475—482; S. C. 11 L. J. Q. B. 282; 3 G. & D. 246.)

The proceedings which take place with respect to the burgess lists in a borough, under stat. 5 & 6 Will. IV. c. 76, between September 5th and November 1st, are only for the preparation of that which is to be the burgess list or roll for the year beginning on November 1st; and, until that day, the placing of a name upon the list or roll gives no qualification under the statute, the list or roll of the former year being the burgess list or roll till November 1st.

Therefore, where a person not a councillor was elected alderman, to supply an extraordinary vacancy, on October 29th, his name being on the revised burgess list finally made up on October 22nd, but not being on the burgess list of the preceding October:

Held, that he was not, at the time of election, "entitled to be on the burgess list" within stat. 5 & 6 Will. IV. c. 76, s. 28, and therefore was not qualified to be a councillor, and not properly elected alderman. *Quo warranto* information granted.

A RULE nisi was obtained in Michaelmas Term, 1841, for a *quo warranto* information against Robert Ellison Harvey, to show

(1) Distinguished in *Budge v. Andrews* (1878) 3 C. P. D. 519, 47 L. J. C. P. 586.

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by what authority he claimed to be an alderman of the borough of Liverpool, on grounds which will appear by the following statement.

Mr. Harvey was elected on 29th October, 1841, to fill up an extraordinary vacancy in the office of alderman, under stat. 5 & 6 Will. IV. c. 76, s. 27 (1), which requires that the alderman, in such case, shall be elected "either from the councillors or from the persons qualified to be councillors." Mr. Harvey, when elected, was not a councillor: and his qualification to be a councillor was disputed on the ground that he was not, at the time of his election, "entitled to be on the burgess list" of the borough, according to sect. 28.

[*476] It appeared by the affidavit of the deputy town clerk *that Mr. Harvey's name was entered in the burgess list made out by the overseers on September 5th, 1841, and delivered on that day to the town clerk. That the list was duly revised by the mayor and assessors between the 1st and 15th of October, and Mr. Harvey's name retained, no objection having been made to it. "That the burgess lists so revised, and signed as directed by the said Act, were delivered by the mayor to the town clerk of the said borough, and that the said town clerk caused the said burgess lists to be fairly and truly copied into one general alphabetical list of the burgesses of each ward in a book by him provided for that purpose, with every name therein numbered, beginning " &c. (as prescribed in sect. 22 of stat. 5 & 6 Will. IV. c. 76 (2)) : "and that such book was completed on or before the 22nd day of October, 1841; and that such book is the burgess roll of the burgesses of the said borough entitled to vote as in the said Act mentioned." And that Mr. Harvey's name was inserted in the said burgess roll.

His name was also inserted in the burgess list made out by the overseers for 1840, 1841; but the revision of that list was never completed. In last Easter Term (3) :

Kelly and Crompton showed cause (4) :

[*477] The question is, whether a person whose name has been placed on the *overseers' lists, retained on revision, and entered in the

(1) See now Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 14 (3).

(2) *Ibid.*, s. 45 (1).

(3) May 5th. Before Lord Denman, Ch. J., Patteson, Williams, and Wightman, JJ.

(4) A statement of the matters to

be discussed had been drawn up and agreed to by counsel on both sides, in the following words.

"It is agreed that the only questions upon the affidavits for the opinion of the Court are: Whether Mr. Harvey, being on the overseers' lists of 1841,

burgess roll by the town clerk, is thereby "entitled to be on the burgess list" within sect. 28, before November 1st, the commencement of the year for which the list is made up. The right to vote would not accrue till November 1st; but sect. 28 does not require that the party shall be entitled to vote as a burgess: he must be "entitled to be on the burgess list;" and the question is, what constituted the burgess list, for the purpose of this enactment, on 29th October, 1841. It was the list made out on September 5th, and completed on 22nd October, 1841. The defendant was then on the burgess roll, though his right to vote was suspended. * * *

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Sir W. W. Follett, Solicitor-General, Wortley and G. Henderson,
contra :

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Mr. Harvey was neither a burgess, nor qualified to be a councillor on the 29th of October, when he was elected alderman. A person becomes burgess only by being on the roll, properly so called, which is made up on 22nd October, and takes effect from November 1st. Mr. Harvey, on October 29th, was not on any burgess roll then in operation. * * *

Cur. adv. vult.

LORD DENMAN, Ch. J., in this vacation (June 24th), delivered the judgment of the Court :

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After stating the nature and grounds of the application, and the date of Mr. Harvey's election, and referring to stat. 5 & 6 Will. IV. c. 76, s. 27 (1), his Lordship said :

By that section, whenever an extraordinary vacancy takes place in the office of alderman, the council are, within ten days, to elect made out under stat. 5 & 6 Will. IV. c. 76, s. 15, and remaining upon them upon the revision under sects. 18 and 19, and upon the delivery of them as revised to the town clerk under sect. 22, and being accordingly, under that section, put upon the burgess roll duly made out for the year 1841 by the town clerk, and completed before the 22nd of October, 1841 (as deposed to by the deputy town clerk, at the joint request of the relator and the defendant), and being entitled to be on such lists and roll, but not having been, or having been entitled to be, on any list or roll in or previous to the year 1840, except that he was in point of fact on the overseers' list made out for the year

1840, the revision of which list was never completed, and having the requisite estate, and being also rated in the requisite amount for a councillor, required by sect. 28, was, on the 29th of the same month of October, qualified to be elected an alderman of the borough, he having been elected to that office on that day, and having, within the five days (viz. on the 1st of November, 1841), made and subscribed the acceptance of office, and also the declaration required by stat. 9 Geo. IV. c. 17; or Whether on the 1st day of November he was a good alderman."

(1) See now Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 14.

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some other person, either from the councillors or from the persons qualified to be councillors; and by the twenty-eighth section it is enacted that no person shall be qualified to be elected or to be a councillor or an alderman, if he is not entitled to be on the burgess list of the borough. Mr. Harvey was not a councillor of the borough: but, on the 5th of September in the year 1841, the name of Mr. Harvey, who was not entitled to have his name on the previous list or roll, was placed upon the list, made out by the overseers, of persons entitled to be enrolled in the burgess roll of that year. Upon revision of the lists, Mr. Harvey's *name was retained; and it appeared that the book to be made out by the town clerk, containing the general alphabetical list, had been completed on the 22nd of October, pursuant to the twenty-second section of the Act, and that Mr. Harvey's name was on it. The question was, whether the list upon which Mr. Harvey's name appeared at the time of his election was "the burgess list" of the borough at the time of his election, within the meaning of the twenty-eighth section; and whether his being entitled to have his name upon that list, and it being actually there, qualified him to be elected an alderman on the 29th of October, 1841.

By the fifteenth section of the Act, the overseers of the poor of every parish within the borough are, on the 5th of September, to make out an alphabetical list, to be called "the burgess list," of all persons entitled to be enrolled in the burgess roll of that year in respect of property within the parish; and the overseers are to sign such burgess lists, and deliver them to the town clerk on the 5th of September. These lists (which in sections 18, 19, and 20 are called burgess lists (1)) are to be revised, as directed by those sections, and, by the twenty-second section, the burgess lists so revised are to be delivered by the mayor to the town clerk, who is to cause them to be copied into one general alphabetical list in a book to be completed on or before the 22nd October: and such book is to be the burgess roll (2) of the burgesses entitled to vote at any election between the 1st of November in the year wherein such burgess roll is made and the 1st of November in the following year.

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Some doubt may be raised on the language of the Act of Parliament, as to what is intended by the term "burgess list," and whether the list, or rather lists, made *out by the overseers, or the general alphabetical list made out by the town clerk, should be

(1) See now *Municipal Corporations Act, 1882* (45 & 46 Vict. c. 50), s. 44. (2) *Ibid.*, s. 45.

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considered the burgess list: but we are of opinion that, in order to be qualified, the name of Mr. Harvey ought to have appeared upon the list or roll which was in force during the current municipal year, ending on the 1st of November, 1841, and that it was not enough that his name should appear upon a list or roll which was not to be in force until the 1st of November, 1841. Had Mr. Harvey's name been upon the list or roll which was in force during the current year, between the 1st of November, 1840, and the 1st of November, 1841, he would clearly have been qualified, though his name had not been on the list upon which it is now; and it seems equally clear that the Legislature did not intend that there should be two burgess lists, containing different names, in operation at the same time, at any period during the current year. The proceedings which take place with respect to the burgess lists between the 5th of September and the 1st of November in any year are only for the preparation of a list which is to be the burgess list or roll for the year beginning on the 1st of November: and, until that day arrives, the placing of a name upon it will give no qualification to the party whose name is so placed, the list or roll of the former year being the burgess list or roll until that day.

This view of the case, derived entirely from the Act itself, is not altered by any thing in stat. 7 Will. IV. & 1 Vict. c. 78, or any subsequent Act: and we therefore think that the rule should be made absolute.

Rule absolute. !

COATS AND ANOTHER v. CHAPLIN AND ANOTHER (1).

(3 Q. B. 483—492; S. C. 11 L. J. Q. B. 315; 2 G. & D. 552; 6 Jur. 1123.)

The traveller of M., a tradesman residing in London, verbally ordered goods for M. of plaintiff, a manufacturer at Paisley. No order was given as to sending the goods. Plaintiff gave them to defendant, a carrier, directed to M., to be taken to him, and also sent an invoice by post to M., who received it. The goods having been lost by defendant's negligence, and not delivered to M.:

Held that defendant was liable to plaintiff.

CASE. The declaration charged that defendants, before &c., were, and still are, common carriers, in connection with the Grand Junction Railway Company, (that is to say) to carry and convey goods from the London terminus of the London and Birmingham Railway, and deliver the same to the consignees thereof in London

(1) Cp. *Coombs v. Bristol and Exeter Ry. Co.* (1858) 3 H. & N. 510, 27 L. J. Ex. 401.

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and the vicinity: that plaintiffs, on &c., at &c., caused to be delivered to the Grand Junction Railway Company, and the Grand Junction Railway Company then accepted and received of and from plaintiffs, a parcel containing goods, to be safely and securely carried and conveyed by the Grand Junction Railway Company from Liverpool to London, upon and along divers railways, according to the statutes in such case &c.; and the Grand Junction Railway Company, having so carried and conveyed the said goods for plaintiffs from Liverpool to London, afterwards, to wit on &c., at the terminus of the London and Birmingham Railway at London, delivered the same to defendants, as such common carriers, for and on behalf of plaintiffs, to be taken care of by defendants, and to be safely and securely carried and conveyed from the said terminus, and to be delivered by defendants, as such common carriers, for plaintiffs, to the consignees of the said goods at London, to wit Messrs. J. and J. Morrison, there, for certain reasonable reward: and defendants, as such common carriers, then took and received the said goods, for and on behalf of plaintiffs, to be *taken care of &c. Breach, non-delivery to the consignees at London, and that defendants so carelessly &c., that the goods were wholly lost to plaintiffs.

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Pleas. 1. Not guilty. Issue thereon.

2. That the Grand Junction Railway Company did not deliver the goods, or any part thereof, to defendants, for and on behalf of plaintiffs, to be safely carried &c., and delivered, for plaintiffs, to the consignees; nor did defendants take and receive the same, for and on behalf of plaintiffs, for the purpose aforesaid, in manner and form &c.: conclusion to the country. Issue thereon.

There were other issues of fact.

On the trial, before Wightman, J., at the Middlesex sittings in Trinity Term, 1841, it appeared that the plaintiffs were manufacturers at Paisley, in Scotland, and that the defendants were common carriers, in connection with the Grand Junction and other Railway Companies. In August, 1840, the traveller of a firm trading in Fore Street, London, under the style of "Morrison, Dillon, & Co.," ordered the goods in question, amounting in value to 80*l.* 4*s.* 3*d.*, of the plaintiffs at Paisley, verbally; and it was not shown that any direction as to the mode of conveyance, or any express order that the goods should be sent at all, was given. The plaintiffs, August 18th, sent the goods by the Paisley and Glasgow carrier, in a truss which was directed "Messrs. J. and J. Morrison,

London," and, at the same time, sent an invoice by post in a letter bearing the same direction : this invoice was headed as follows :

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" PAISLEY, 15th August, 1840.

" Messrs. J. and J. Morrison. Bought of Coats and Shaw."

The letter containing it was received in due course by Messrs. Morrison, Dillon, & Co. in London. The *truss, directed as aforesaid, was delivered on 22nd August at the Grand Junction Railway Company's office at Liverpool, and, on 25th August, was, with other articles, put into the hands of the defendants at the London terminus of the London and Birmingham Railway, for delivery to the respective consignees. The defendants did not deliver the truss to any person as the consignee. For the defendants it was contended that plaintiffs, the consignors, having done every thing in their power to render the contract binding, had parted with the ownership, and could not maintain the action; and that, defendants having received the goods on behalf of the consignees, the allegation of receipt on behalf of plaintiffs was negatived : *Dutton v. Solomonson* (1) and *Morgan v. Sykes* (2) were cited. The learned Judge overruled the objections, reserving leave for the defendants to move to enter a nonsuit, or a verdict for defendants on the second issue. Verdict for the plaintiffs on all the issues.

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Platt, in the same Term, obtained a rule according to the leave reserved.

Erle and *Knowles* now showed cause :

Delivery, on a perfect contract, to the vendee's agent, or his usual carrier, is a delivery to vendee : *Dutton v. Solomonson* (1), *Dawes v. Peck* (3) ; but, where the contract is imperfect, or the goods are sent by a conveyance not authorised by the vendee, or the vendee retains an option to refuse the goods, the property, until acceptance *by the vendee, remains in the vendor : *Swain v. Shepherd* (4), *Freeman v. Birch* (5). The consignee's right to sue arises only as soon as some right of property has passed to him : *Fragano v. Long* (6), *Alexander v. Comber* (7). In the present case no property passed to the consignees, because, as against them, the Statute of Frauds (8) had not been complied with, no contract

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(1) 7 R. R. 883 (3 Bos. & P. 582).

(5) 38 R. R. 388. Cited from 1 Nev.

(2) Before Lord Abinger, C. B. Not reported. See p. 270, *post*.

& M. 420. See p. 274, note (1), *post*.

(3) 4 R. R. 675 (8 T. R. 330).

(6) 28 R. R. 226 (4 B. & C. 219).

(7) 1 H. Bl. 20.

(4) 42 R. R. 782 (1 Moo. & Rob. 223).

(8) 29 Car. II. c. 3, s. 17.

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having been made out and signed by them : *Hanson v. Armitage* (1), *Elmore v. Kingscote* (2), *Hoadley v. M'Laine* (3) ; and they could not have maintained trover for the goods : *Alexander v. Comber* (4). In the cases which will be relied on as authorities to the contrary, *Saunderson v. Jackson* (5) and *Schneider v. Norris* (6), the bills of parcels were virtually signed by the parties charged. In *Morgan v. Sykes* (7) the plaintiffs sent two pipes of wine to a customer on a written order, and by a specified conveyance ; but the order did not state the price : one pipe, the subject of that action, was lost by the negligence of the defendant, the carrier : the case was tried before Lord ABINGER, C. B., who held that the price could not be supplied by parol evidence, and therefore that there was no memorandum within the statute (8) : the defendant then relied on a part acceptance by the consignee in receiving the other pipe ; but the LORD CHIEF BARON held that part acceptance after the cause of action had accrued amounted to nothing : and, the case being afterwards moved, on behalf of the defendant, in the Exchequer, that Court *held that the LORD CHIEF BARON was right on both points. In the present case there is neither memorandum signed by the consignees, nor acceptance (9). As regards the second issue, the only question is, whether the Railway Company delivered the goods to the defendants, the ultimate carriers : it has already been shown that there was no delivery on behalf of the consignees.

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Platt and Bros, contra :

The question is, whether the non-fulfilment of the requisites of the Statute of Frauds makes this case an exception to the general rule, that goods sent by a carrier are the property of the consignee. The cases on this subject are collected in 1 Selw. N. P. 406 (10), Carriers, IV. If the consignees here had sued the plaintiffs for non-delivery, they must have succeeded, on the authority of *Schneider v. Norris* (6), which shows that, in such an action, the invoice would have been sufficient evidence for the consignees.

(1) 24 R. R. 478 (5 B. & Ald. 557).

(2) 29 R. R. 341 (5 B. & C. 583).

(3) 38 R. R. 510 (10 Bing. 482).

(4) 1 H. Bl. 20.

(5) 5 B. R. 580 (2 Bos. & P. 238).

(6) 15 R. R. 250 (2 M. & S. 286).

(7) Before Lord Abinger, C. B. Not reported.

(8) 29 Car. II. c. 3, s. 17.

(9) It was also argued that the con-

signees were discharged, as against the consignors, by the parcel having been neither delivered nor properly directed : and, as to this, *Buckman v. Levi*, 3 Camp. 414, and *Clarke v. Hutchins*, 13 R. R. 283 (14 East, 475), were cited. On this point the Court gave no opinion.

(10) Ed. 10.

(PATTERSON, J. : The consignees might have repudiated the goods ; for they had not accepted. Then how could they sue the carrier ? In *Hart v. Sattley* (1) CHAMBRE, J. held that there was an acceptance, because the goods were delivered to a carrier through whom the vendee had been in the habit of receiving goods from the vendor : but nothing of that sort is in proof here. In *Dawes v. Peck* (2) the goods were delivered to a carrier named by the consignee.)

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The consignors *themselves were the agents of the consignees, as soon as the goods were put in motion for the consignees : the carrier is at least as much the agent of the consignees. This is not a question between consignor and consignee : the question on the second issue is, for whom the goods were delivered to and received by the defendants. In note (1) to *Wilbraham and Snow* (3) it is shown that delivery to the carrier gives the possession to the consignee generally : though, if the consignor agree with the carrier to pay the price, he is then an insurer to the consignee for the safe delivery, and becomes the contractor with the carrier ; which was the exception in *Moore v. Wilson* (4), as explained by Lord KENYON in *Dawes v. Peck* (5). This is the principle of *Freeman v. Birch* (6) and *Syms v. Chaplin* (7). In *Swain v. Shepherd* (8) the goods had not been contracted for. “ If A. delivers goods to B. to be delivered over to C., C. hath the property, and C. hath the action against B. ; for B. undertakes for the safe delivery to C., and hath no property or interest but for that purpose : ” 1 Bac. Abr. 515 (9), Bailment, (D.). A recovery in trover by the consignee against the carrier would not prevent the delivery to the carrier from operating as a delivery to the consignee, in an action between him and the consignor : *Groning v. Mendham* (10). Even if sect. 17 of the Statute of Frauds were applicable, its effect would be, not to destroy the contract, but merely to preclude giving evidence of it between the vendor and vendee : the contract must not be confounded *with the remedy upon it : *Stead v. Dawber* (11). In *Thornton v. Kempster* (12) the Court observed that the objection on the Statute of Frauds “ did not interfere with the substance of the contract.” In this case the

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(1) 3 Camp. 528.

(2) 4 R. R. 675 (8 T. R. 330).

(3) 2 Wm. Saund. 47 k.

(4) 1 R. R. 347 (1 T. R. 659).

(5) 4 R. R. 678 (8 T. R. 333).

(6) See p. 274, note (1), *post*.

(7) 44 R. R. 523 (5 Ad. & El. 634).

(8) 42 R. R. 782 (1 Moo. & Rob. 223).

(9) 7th ed. Citing 1 Roll. Abr. 606 ; tit. Detinue (C), pl. 1.

(10) 5 M. & S. 189.

(11) 50 R. R. 327 (10 Ad. & El. 57, 65).

(12) 15 R. R. 658 (5 Taunt. 786, 788).

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plaintiffs had no right left, as against the consignees, except that of stoppage *in transitu*; and that only in the case of insolvency.

LORD DENMAN, Ch. J.:

The case on the part of the plaintiffs is, that the goods had not passed from the plaintiffs, so far as to give them a right of action against the consignees, who had had no opportunity of accepting so as to satisfy the Statute of Frauds. The fact, no doubt, is so: there had been no such acceptance. The invoice makes no difference: that was merely a memorandum made by the consignors; it showed no contract between the parties. The order was general; no directions were given to send by a particular carrier; the defendant was selected by the consignors. There was, therefore, no acceptance by the consignees. Our decision in favour of the plaintiffs is not at variance with the cases which show that, where the property has passed to the consignee, he is the proper party to sue. *Swain v. Shepherd* (1) goes the full length of this case. There the consignee had ordered the goods only on approval, and retained the power of rejection; and PARKE, J. held that the consignor might sue for the loss. The language of the learned Judge there is, indeed, confined to the facts of the particular case; but the principle which we are now acting upon is recognized, namely that, until *the property has passed from the vendor, he may treat the goods as his in an action against the carrier.

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PATTESON, J.:

We have not the facts very exactly before us: the order was oral; but probably more passed than was actually proved. If the consignees had selected a particular carrier, it would have made a difference: perhaps, if they had ordered that the goods should be sent by "some carrier," the delivery to any carrier might have constituted a delivery to the consignees. But I do not see how the mere order can have the effect contended for. Morrison, Dillon & Co. might have waited, or might themselves have sent for the goods. I do not see how delivery by a consignor, of his own accord, to a carrier can be a delivery to the consignee. Therefore, I think that the consignors here may maintain the action. Many nice distinctions as to the delivery of goods have arisen upon the Statute of Frauds. But suppose that in this case there had

(1) 42 R. B. 782 (1 Moo. & Rob. 223).

been a written order, as silent as the verbal order appears to have been respecting the sending of the goods: how could the vendors, upon sending them by a carrier of their own selection, have become entitled to charge the vendees for goods sold and delivered? I think that the property had not passed, and that the action is maintainable.

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WILLIAMS, J.:

The carrier must be responsible to one party or the other: but, if the wrong party were to recover against him, he would be liable to be harassed again. This case is distinguishable from any that have been cited for the defendants. I cannot find any instance in which the right has been held to pass to the *consignee, where he has not expressly directed the sending by some particular conveyance, or at least the sending by some conveyance or other. Here there is merely an order for the goods: there is no evidence that any thing was either said or implied as to the sending them. The plaintiffs might have waited for further directions: at any rate, nothing had passed which would give them a right against the consignees. The goods therefore were still the property of the consignors; and consequently this action is maintainable.

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WIGHTMAN, J.:

To entitle the consignee to bring such an action as this, the property should be in him. At first I was struck with the apparent applicability of *Dutton v. Solomonson* (1), which case is more favourable to the defendants than any other cited. But there the vendee seems to have ordered that the goods should be sent by some carrier (2), though he did not name any one. Here it was not proved that any mode of conveyance was expressly ordered, nor that there was, as in *Hart v. Sattley* (3), any regular course of business between the parties in this respect. The case therefore being distinguishable from all those cited, we should be going farther than any authority has yet gone if we held that the property was here vested in the vendees. Without going so far as to hold that a consignee can never maintain such an action as this unless the requisites of the Statute of Frauds have been so satisfied as to render him liable to an action for goods sold and delivered by

(1) 7 R. R. 883 (3 Bos. & P. 582).

(3) 3 Camp. 528. [Over. *Meredith v.*

(2) See the judgment of Lord Meigh (1853) 2 El. & B. 364, 370; 22 ALVANLEY, 7 R. R. 884 (3 Bos. & P. L. J. Q. B. 40.]

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the consignor, it is enough for us now to say *that it has in no case been held that the property passed to the consignee by the consignor's mere delivery to a carrier, the consignee having given no order whatever for the sending.

Rule discharged (1).

(1) The following is the case referred to in the argument, pp. 269, 271.

FREEMAN v. BIRCH.

1833.
 April 26.

A laundress sent linen, which she had washed, to the owner, by the carrier, whom she paid. The carrier having lost it: Held, that the laundress was entitled to sue the carrier for the loss.

ACTION on the case against a carrier for the loss of goods. Plea, Not guilty. On the trial, before Patteson, J., in Easter Term, 1833, in the Bail Court, it appeared that the goods consisted of linen belonging to a person named Spike, who lived in London. The plaintiff was a laundress living at Hammersmith, and had been entrusted with the linen to be washed for the owner. She was in the habit of sending it, when washed, to the owner in London; and she paid the carriage to London. The goods were lost by the carrier in their passage from the country to London. The learned Judge was of opinion that, under these circumstances, the plaintiff was entitled to recover. Verdict for plaintiff.

Heaton now moved for a new trial:

The action should have been brought by the owner of the linen. He had the property, and was also the con-

signee. In *Selwyn's Nisi Prius*, tit. Carriers, IV. (see vol. i. p. 406, ed. 10), the cases are collected: and it appears that the consignee is the proper party to sue for the loss of goods consigned to him. *Dawes v. Peck* (1), and *Dutton v. Solomonson* (2), are authorities to this effect. There it was held that the delivery to the carrier had passed the right to the vendee: and the present is, in this respect, like the case of a vendor and vendee.

LITTLEDALE, J.:

If there be a complete sale, the property is out of the vendor altogether. But here the plaintiff had a special property, which had not passed from her.

PARKE, J.:

The question is, who employed the carrier, and at whose risk were the goods carried? The plaintiff paid for the carriage. The owner of the linen was not the employer of the carrier; and the risk of the bailee was not over till the goods were delivered. In the case of a complete sale, the vendor transmits as agent for the vendee.

Per CURIAM (DENMAN, Ch. J., LITTLEDALE and PARKE, JJ.):

Rule refused.

(1) 4 R. R. 675 (8 T. R. 330).

(2) 7 R. R. 883 (3 Bos. & P. 582).

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE QUEEN'S BENCH.)

WHYTE, ADMINISTRATOR, &c., v. ROSE.

(3 Q. B. 493—510.)

To an action of debt on a deed, by an administrator under a prerogative administration from the Archbishop of Canterbury, it is no answer that the intestate died abroad, and that, at the time of the death, the deed was in Ireland, and was *bona notabilia* to be administered in Ireland.

So held by the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench.

1840.
June 24.
1842.
Feb. 7.
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DEBT. The plaintiff declared as administrator of the goods, &c., of Ellen Davy (formerly Loneragan), deceased, for arrears of an annuity granted to her, while sole, by a certain indenture &c., payable at &c., in the city of Dublin, by four equal quarterly payments &c.

The letters of administration were set out on *oyer*, and appeared to have been granted by the Archbishop of Canterbury, on January 16th, 1838, to the plaintiff as the attorney of Manning Davy, the lawful husband of Ellen Davy, formerly Loneragan, spinster, late of Halifax, in Nova Scotia, deceased. They recited that "the said Ellen Davy, formerly Loneragan, as is alleged, lately died intestate, having, whilst living, and at the time of her death, goods and chattels" &c., "in divers dioceses" &c. (in the usual form); and they constituted the plaintiff administrator of all and singular the goods, &c., of the deceased, for the use and benefit of the said Manning Davy, then residing at Quebec in Upper Canada, and until he should duly apply for and obtain letters of administration, &c. Plea: "That Halifax in Nova Scotia is in parts beyond the seas; and that, before and at the time of the death of the said Ellen, to wit on 6th October, A.D. 1835, the indenture in the declaration mentioned was without the province of Canterbury, to wit at Dublin in the kingdom of Ireland, and was not then, *at the time of the death of the said Ellen, to be administered within the province of Canterbury; but, on the contrary thereof, was then of the notable goods of the said Ellen to be administered within the kingdom of Ireland." Verification.

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Demurrer, assigning for causes: "That it is not alleged, or shown in the said plea, that the said indenture was, at the time of the death of the said Ellen, *bona notabilia* or assets within any province or diocese of England, or that the said Ellen had, at the

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time of her death, within this realm, any other assets or goods whatsoever; but, on the contrary, the plea shows the said Ellen and the said indenture to have been beyond seas at the time of her death, and does not in any manner invalidate the grant of the administration to the plaintiff, or the plaintiff's title to sue on the said indenture." Joinder.

The demurrer was argued in Easter Term, 1840 (1), by *J. W. Smith* for the plaintiff, and *Sir F. Pollock* for the defendant. It is considered sufficient to report the argument in the Court of Error (2).

Cur. adv. vult.

LORD DENMAN, Ch. J., in Trinity vacation (June 24th), 1840, delivered the judgment of the COURT:

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This was an action of debt on an indenture made between the intestate and the defendant. The plaintiff made *profert* of letters of administration granted by the Archbishop of Canterbury. The plea shows that the *intestate was a British subject, and died at Halifax, in Nova Scotia: and that, at the time of her death, the indenture was at Dublin in Ireland, and was *bona notabilia* to be administered there. To this plea there was a demurrer, showing for cause that the plea does not show *bona notabilia* in any province or diocese in England, without the province of Canterbury, but, on the contrary, shows that the indenture was beyond the seas.

It was argued that the plea was in the nature of a plea to the jurisdiction of the Archbishop, and ought to show a proper jurisdiction. This is not strictly so; it is a plea in bar: but still it may be true that it ought to show some other jurisdiction, because it may be that the letters of administration of the Archbishop of Canterbury are in all cases good, unless it be shown that the granting them belongs to some one else.

Now, if this indenture had been alleged to have been in the province of York, there is no doubt that the plea would have been good. The question is therefore reduced to this, whether the Court is bound to take judicial notice that the granting letters of administration of goods in Ireland belongs to some authority there. We

(1) April 24th. Before Lord Denman, Ch. J., Littledale, Patteson, and Coleridge, JJ.

(2) Besides the authorities cited in the Exchequer Chamber, the following were referred to in the argument

below: *Spratt v. Harris*, 4 Hag. Ecc. Ca. 405, 408, 1 Will. Ex. 270 (3rd ed.), Part I. B. 4, c. 3, s. 6; *Attorney-General v. Cockerell*, 15 R. R. 707 (1 Price, 165, 179).

take the words of the plea, "the kingdom of Ireland," to mean "that part of the United Kingdom of Great Britain and Ireland, called Ireland;" and, no doubt, we are bound to take such judicial notice. In *Shaw v. Stoughton* (1), "Dictum fuit per Hale et nemy deny, si home morust aiant biens en les several provinces de York et Canterbury, several administrations doint estre commit, et issint si en Angleterre et Ireland."

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But it is said that Irish letters of administration would *not enable the administrator to sue here. The cases cited by no means establish that proposition as regards an action for goods in Ireland, whatever may be the case if the action be for goods in England. But, at all events, they do not dispense with Irish letters of administration, even if it be necessary to add English letters *ad litem*, which the letters in the present case are not. No case establishes that the Archbishop of Canterbury has original jurisdiction over *bona notabilia* in Ireland. Our judgment must therefore be for the defendant.

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Judgment for defendant.

The plaintiff brought error in the Court of Exchequer Chamber, assigning, as errors, that the plea was not sufficient in law, and that judgment was given for the defendant, whereas &c. Joinder in error.

The case was argued in the Exchequer Chamber in Michaelmas vacation, 1841 (2).

J. W. Smith, for the plaintiff in error (plaintiff below (3)):

First: To maintain an action at law in *England on a deed which at the time of the death was assets in Ireland, it is necessary,

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(1) 2 Lev. 86; *S. C.* 8 Keb. 163.

(2) November 29th and 30th. Before Tindal, Ch. J., Lord Abinger, C. B., Coltman, and Maule, JJ., and Parke, Alderson, and Rolfe, Barons.

(3) The points made by the plaintiff were stated in the margin of the error book, as follows. "That the plea is bad in form and substance, and contains no legal or valid answer to the declaration; that the letters of administration, stated in the declaration and set out on *oyer*, are sufficient to entitle the plaintiff to maintain his action: that the plea shows nothing to invalidate them, and shows no other

jurisdiction by which administration could have been granted, or by which it ought to have been granted, in order to entitle the plaintiff to maintain this action: and that the plea is bad for uncertainty, and does not show that the deed on which the action is brought was, at the time of the intestate's death, within any specified diocese or ecclesiastical jurisdiction in the United Kingdom of Great Britain and Ireland, other than the province of Canterbury, or that it was out of the jurisdiction of the Archbishop of Canterbury."

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and is sufficient, that the administrator should have letters of administration from an Ecclesiastical Court in this country: Irish letters of administration need not be superadded. That the letters from the Archbishop's Court are good, and a foreign grant of administration not material, appears from *Tourton v. Flower* (1), *Logan v. Fairlie* (2), and *Low v. Fairlie* (3). The cases are collected and discussed in *Tyler v. Bell* (4); and, in *Price v. Dewhurst* (5), Lord COTTENHAM, L. C., said: "How can this Court, in administering a testator's property, take any notice of a will of which no probate has been obtained from the Ecclesiastical Court of this country? This Court knows nothing of any will of personalty, except such as the Ecclesiastical Court has, by the probate, adjudged to be the last will." These cases, indeed, did not relate to Ireland: but in *Swift v. Swift* (6), decided in that country, a person having obtained letters of administration in England sued out a *ne exeat regno* in Ireland against a party who had there possessed himself of the assets; and it was held that the process could not be supported, because no administration had been taken out in Ireland. The converse would follow in a similar case: a personal representative, to sue in England, must have taken out administration here, and could not entitle himself by letters of administration from an Irish Court. [*498] *In *Carter and Crost's* case (7) a question discussed was, whether a person having Irish letters of administration might bring an action here as administrator; and it was holden that he could not: the point proved not material to the event of the cause; but the decision appears to have been a deliberate one. Again, if administration of assets in Ireland be taken out in this country, it cannot be necessary here that the party should have Irish letters of administration also; the object of taking out administration here being only that the party may be known, and that disputes may not arise as to the foreign law.

(LORD ABINGER, C. B. mentioned *Currie v. Bircham* (8).)

That case did not turn upon the grant of administration by any particular Court, but on the character in which the defendant held the assets. *Respondet superior* was the principle on which the

(1) 3 P. Wms. 369.

(2) 25 B. R. 208 (2 Sim. & St. 284).

See *S. C.* (before the Lords Commissioners) 1 My. & Cr. 59.

(3) 2 Madd. 101.

(4) 2 My. & Cr. 89.

(5) 42 R. R. 176 (4 My. & Cr. 76, 80);

S. C. (before the Vice-Chancellor) 8 Sim. 279.

(6) 1 Ball & B. 326.

(7) Godb. 33.

(8) 24 R. R. 634 (1 Dowl. & Ry. 35).

decision went: the case in this respect was analogous to *Stephens v. Badcock* (1). Before 1 stat. 31 Edw. III. c. 11, the law was, that neither the Ordinary nor an administrator could "have any action of debt, covenant, or any other action which belonged to the intestate; but those to whom the Ordinary commit administration may have all these actions by the statute;" 2 Inst. 398, and the authorities there cited: 1 Roll. Abr. 906, Executor (A). But this statute, being subsequent to the twelfth year of the reign of King John, and not naming Ireland, would not extend to that country (1 Bla. Com. 101) were it not for Poynings' law, stat. 10 Hen. VII. c. 22 (Irish); and that law would not give an Irish administration any force in this country. If, therefore, a representative suing here could not avail himself of English letters of administration, he could *not sue in this country as administrator at all. But, even if an Irish administration were necessary, the Court would assume here that it did exist. Lord COTTENHAM, L. C., in *Price v. Deuchurst* (2), mentions it as the practice of Ecclesiastical Courts, where the assets are found, to "grant probate or give authority by letters of administration, for the purpose of giving a legal right to recover and deal with the property," whether that purpose be effected by "granting probate, upon production of an exemplified copy of the will proved where the domicile was," or otherwise, as there pointed out. It is not necessary that, in such a case, the prerogative letters in England should be *ad litem* only (3); a general administration comprehends all others. Omitting *profert* of letters of administration is ground of special demurrer (4); the omission here, as to letters obtained in Ireland, could have been taken advantage of only in that manner; and there is no demurrer on that account. It may also be argued that convenience is in favour of not requiring Irish letters of administration to be shown. The English Courts of common law could hardly enquire into their validity if, for instance, a question of boundary arose.

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(LORD ABINGER, C. B.: Can Courts of common law enter into such an enquiry at all? I recollect once objecting to a probate on the ground that the stamp was not sufficient for the amount of property; but Lord KENYON would not listen to the objection.)

(1) 37 R. R. 448 (3 B. & Ad. 354).

(2) 42 R. R. 176 (4 My. & Cr. 84).

(3) He referred to the discussion upon stat. 38 Geo. III. c. 87, in *Taynton v. Hannay*, 6 R. R. 596 (3 Bos. &

P. 26).

(4) See *Slowe v. Wilmott*, 2 Saund. 402; *Gidley v. Williams*, 1 Ld. Ray. 634; stat. 4 Ann. c. 16, s. 1.

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If the Prerogative Court be imposed upon, the letters may be *revoked: but how can that be done here, if the administration be Irish?

As to the authorities supposed to be in favour of the plea. The Act of Union, 39 & 40 Geo. III. c. 67, article 5, merely recognizes the Church as by law established in Ireland. In *Lane v. Bennett* (1) it was held that Ireland was still a place "beyond the seas," under stat. 4 Anne, c. 16, s. 19. An Irish record is not matter of record in England: *Harris v. Saunders* (2). An Irish bill of exchange is not an inland bill: *Mahoney v. Ashlin* (3). *Shaw v. Stoughton* (4) indeed contains a *dictum* that, if there be goods in England and Ireland, there must be administration in each; but in Keble's report of that case (5) it appears that the case was adjourned. And in *Carter and Crost's* case (6) it was the opinion of the Court, as before pointed out, that the Irish administration was ineffectual in England. It may however be admitted that for the purpose of suing in Ireland there must be an Irish administration: but there must be an English administration for the purpose of suing in England. And that view seems to be confirmed by *Daniel v. Luker* (7). In Com. Dig. Administrator (B 3) it is said, "If he has *bona notabilia* in Ireland, and also in England, it shall be granted by the Archbishop of Dublin for the goods in Ireland, and by the Archbishop of Canterbury for the goods in his province;" for which reference is made to 1 Rol. Abr. 908, Executor (G) pl. 1, *Shaw v. Stoughton* (4), and *Danyel v.* — (8), *which is the case in 1 Rol. Abr. 908. It appears from Dalison's report that there was no more than a *dictum*.

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(COLTMAN, J.: It is the same case as *Daniel v. Luker* (7), only Watford is printed for Waterford. Nothing was actually adjudged on the point.)

The passage in Rolle is repeated, without any additional authority, in 3 Bac. Abr. 460 (9), Executors and Administrators (E) 3. *Currie v. Bircham* (10) has been already explained. In *Huthwaite v. Phaire* (11) the question was whether the plea was issuable; and it was not so,

(1) 1 M. & W. 70; S. C. Tyr. & Gr. 441.

(2) 28 R. R. 310 (4 B. & C. 411).

(3) 2 B. & Ald. 478.

(4) 2 Lev. 86.

(5) 3 Keb. 163.

(6) Godb. 33.

(7) 3 Dyer, 305 a, pl. 58.

(8) Dalison, 76.

(9) Ed. 7.

(10) 24 R. R. 634 (1 Dowl. & Ry. 35).

(11) 1 Man. & Gr. 159.

upon any view of the law as to the present question. There are expressions in the judgment unfavourable to the plaintiff in error here: but they are not necessary to the decision. In that case 1 stat. 31 Edw. III. c. 11, was not cited.

Further, the pleadings do not raise the point for which the defendant in error is to contend. It should have been averred that the deed was in Ireland at the time of the intestate's death; that it was assets according to the law of Ireland; that there was a Court which could grant administration in Ireland. (He referred to *Tourton v. Flower* (1), *Woodward v. Thompson* (2), *Skidmore v. Winston* (3), *Yeomans v. Bradshaw* (4), *Hilliard v. Cox* (5), 3 Chitt. Plead. 815, 816 (6), *Harvey v. Fitton* (7), *Kearney v. King* (8), *Sproule v. Legge* (9), *Smith v. Smyth* (10): but on these points the COURT pronounced no opinion.)

W. F. Pollock, contra:

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The question is, whether this plea does not show absence of jurisdiction in the Archbishop of Canterbury. If it does, the letters are inoperative. It may be true, as may be inferred from *Swift v. Swift* (11), that Courts of equity require that the representative capacity shall be shown by acts done within the kingdom to which the Courts belong: but that does not give validity in Ireland to such an administration as this. The Act of Union and Poynings' law go at least so far as to show that the Church established in Ireland, and the Courts of law of that country, are to be here recognised. "Probate is not granted in respect of the assets generally, but in respect of such part of them as are, at the testator's death, within the jurisdiction of the spiritual Judge by whom it is granted:" per Lord LYNDEHURST, C. B. in *The Attorney-General v. Dimond* (12). The history and principle of the prerogative administration do not warrant any assumption of the right to dispose of goods in Ireland. The origin of the Bishop's power is merely local and territorial: it was originally in the King as *parens patriæ*: *Hensloe's case* (13): the Bishop used to take the goods, to distribute in *pious usus*, as King's almoner: 2 Black. Comm. 494. Then

(1) 3 P. Wms. 369.

(2) Cro. Eliz. 907.

(3) Cro. Eliz. 879.

(4) Carth. 373.

(5) 1 Salk. 37.

(6) Ed. 6.

(7) Hetl. 68,

(8) 2 B. & Ald. 301.

(9) 1 B. & C. 16.

(10) 10 Bing. 406.

(11) 1 Ball & B. 326.

(12) 35 B. R. 732 (1 Cr. & J. 356, 370; S. C. 1 Tyr. 243, 258).

(13) 9 Co. Rep. 36 b, 38 b.

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the Statute of Westminster 2 (1 stat. 13 Edw. I. c. 19) compelled the Ordinary to pay debts; and, afterwards 1 stat. 31 Edw. III. c. 11, provided that he should appoint the next and most lawful friends to administer. The prerogative administration was probably introduced to save trouble: it is mentioned first by Lyndwood (1), who wrote in the *fifteenth century: but the jurisdiction must have existed much earlier. The amount of *bona notabilia* liable to it is fixed at 5*l.* by the ninety-third canon (A.D. 1603) (2). The Ordinary, whether Archbishop or Bishop, interferes, not as personal representative, but in respect of the property. No reason can be assigned why the Archbishop of Canterbury, rather than of York, should go out of his province. The administrator stands only in the place of the Ordinary; when the administration is granted, it is as if there were no mesne occupation in the Ordinary, but the administrator had held from the death: per *Fortescue* (3).

(LORD ABINGER, C. B.: Can we discuss the propriety of the prerogative grant on this record?)

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In *Gold v. Strode* (4) *scire facias*, on a judgment recovered in an action in Somersetshire, was brought by an administrator under letters from the Bishop of Bath and Wells: the defendant was taken in execution and escaped: on action against the sheriff, it was objected, in arrest of judgment, that the original judgment was erroneous, because it made *bona notabilia* in Middlesex; and it was held that the original judgment was erroneous on this ground, but that the sheriff could not then take advantage of the objection. That shows that the Courts of common law may incidentally notice the question of jurisdiction. Administration granted by the wrong Court is void; though, if granted by the wrong person, it is voidable only: *Blackborough v. Davis* (5). *Simpson v. Tresler* (6) is to *the same effect. In *Huthwaite v. Phaire* (7) TINDAL, Ch. J., recognises the correctness of the proposition in Com. Dig. Administrator (B 3), that for *bona notabilia* in Ireland there must be an Irish administration, and for *bona notabilia* in England an English one.

(1) Provinc. p. 174, lib. iii. tit. 13, not. (m), (ed. 1679).

(2) See 1 Gibs. Cod. p. 472, tit. xxiv. c. 4 (2nd ed.).

(3) In C. P. Year Book, Mich. 18 Hen. VI. fol. 23 B. pl. 7. (*Fortescue*

was counsel for the plaintiff).

(4) 3 Mod. 324; *S. C.* Carth. 148 (with some variation).

(5) 1 P. Wms. 41, 44.

(6) Bul. N. R. 141.

(7) 1 Man. & G. 159, 164.

(TINDAL, Ch. J.: We were there deciding only the question before us.)

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In *Lysons v. Barrow* (1) the record raised the issue in fact, whether a metropolitan administration was good, it being alleged that the goods were within a peculiar: the Court held it voidable, but not void. In *Bingham v. Smeathwicke* (2) it was determined that an administration by the Archbishop of Canterbury is void, unless there be *bona notabilia* in divers dioceses in his province, or the goods be within the diocese of Canterbury; and that this must be averred. In *Allen v. Andrews* (3) the Court assumed that, where debt is brought by an administrator under a prerogative administration, the defendant may show that the goods were in London only. In *Price v. Simpson* (4), in an action of trespass, the Court held that, where there were goods within the diocese of York and also within a peculiar, there could not be a prerogative administration. In *Farrington v. Clerk* (5) it was held that a party who had taken out administration in Bengal as attorney to A. could not pay over money obtained under that grant to parties claiming under an administration in England.

(LORD ABINGER, C. B.: That was only because he obtained the money as A.'s attorney. It seems to me that your argument goes too far, and would show that no administration in England could give a right over goods anywhere out of England. A man may sue here in his own *right, naming himself as executor or administrator under a foreign probate or grant; but does a man ever sue here in the character of executor or administrator under such a probate or grant?)

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If there be *bona notabilia* in two dioceses in different provinces there can be no prerogative administration: *Burston v. Ridley* (6). The form of the letters of administration confines the authority to goods within "divers dioceses or jurisdictions" (7).

The argument from inconvenience cannot be supported. If a foreign probate be good, the Courts here will give it due effect (8). The distinctions suggested on the other side, as to some cases

(1) 2 Bing. N. C. 486.

(2) Cro. Eliz. 455.

(3) Cro. Eliz. 283.

(4) Cro. Eliz. 718.

(5) 3 Doug. 124.

(6) 1 Salk. 39.

(7) 1 Will. Ex. 346 (3rd ed.).

(8) See note (x) to 1 Will. Ex. 270 (3rd ed.).

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in favour of the defendant in error, are not sufficient to explain them: *Daniel v. Luker* (1) is recognised in 1 Rol. Abr. 908, Executor (G), pl. 1: and the passage in Rolle, as well as *Shar v. Stoughton* (2), is recognised in Com. Dig. Administrator (B 3). No inconvenience therefore could arise; for those cases show that the effective administration may be given in each country, confining it to the *bona notabilia* in each. In *Currie v. Bircham* (3) the foreign administration prevailed, as to foreign goods, against the English administration. *Lunn v. Dodson* (4) shows that the locality of the deed fixes the locality of the debt.

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The administration here cannot add to the authority derived from the administration in Ireland. The Courts here would, indeed, in granting probate for English administration, *be regulated by the grant of probate abroad, as in *Larpernt v. Sindry* (5).

(ROLFE, B.: If property came to England after the death, would the foreign administration give a right to it ?

PARKE, B.: Suppose, after a man's death, his watch be brought to England by a third party, could such party, in answer to an action of trover by an English administrator, plead that the watch was in Ireland at the time of the death ?

J. W. Smith, in reply :

The Attorney-General v. Dimond (6) shows only that probate duty is not payable for property out of the country at the time of the death. *Farrington v. Clerk* (7) is a case of estoppel merely; it is much like *Gosling v. Birnie* (8). The cases in which administration by a wrong Ordinary has been held void rest upon 1 stat. 31 Edw. III. c. 11, which, it has been shown, does not apply to Ireland. The form of the letters proves nothing. When the property comes to England it falls within the description.

Cur. adv. vult.

TINDAL, Ch. J., in the vacation after last Hilary Term (Feb. 7), delivered the judgment of the COURT :

The question raised upon this record is, whether the plaintiff

(1) *Dyer*, 305 a, pl. 38, s. 6; *Dalison*, 76.

(2) 2 Lev. 86; *S. C.* 3 Keb. 163.

(3) 24 R. R. 634 (1 Dowl. & Ry. 35).

(4) 1 Rol. Abr. 908, Executor (G), pl. 4.

(5) 1 Hag. Ecc. Rep. 382.

(6) 35 R. R. 732 (1 Cr. & J. 356;

S. C. 1 Tyr. 243).

(7) 3 Doug. 124.

(8) 33 R. R. 497 (7 Bing. 339).

below, to whom letters of administration had been granted by the Archbishop of Canterbury of the goods and chattels of one Ellen Davy, an intestate, who died in Nova Scotia, can maintain an action against the defendant in an English Court of law, upon a bond given to the intestate in her lifetime, it being averred, in the defendant's plea, that such bond, at the time of *the death of the intestate, was without the province of Canterbury, to wit at Dublin in the kingdom of Ireland, and that it was not then, at the time of the death of the intestate, to be administered within the diocese of Canterbury; "but, on the contrary thereof, was then of the notable goods of the said Ellen to be administered within the kingdom of Ireland."

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It is well established that, in the case of a British subject dying intestate in the colonies or in foreign countries, a prerogative administration extends to all the personal property of the intestate wherever situate at the time of his death, whether in Great Britain, or in the colonies, or in any country abroad: and, indeed, from the late case of *Scarth v. Bishop of London* (1) it appears that, where the intestate dies abroad, not having goods in divers dioceses in England, but only in the diocese of London, administration granted to such intestate by the Consistory Court of the Bishop of London will be equally effectual.

It is also well established that, in order to sue in any Court of this country, whether of law or equity, in respect of the personal rights or property of an intestate, the plaintiff must appear to have obtained letters of administration in the proper spiritual Court of this country. See the judgment of Sir JOHN NICHOLL in *Spratt v. Harris* (2); and see also the judgment of the LORD CHANCELLOR in *Price v. Dewhurst* (3). So that, if the plaintiff in the case now before us had in the first instance taken out administration in the proper spiritual Court in Ireland, for the purpose of administering this bond which was found in Ireland (as it is contended he *ought to have done), he could not have sued in England upon such letters of administration, but must have also taken out administration in England from the proper spiritual Court there. This latter point was expressly decided in *Carter and Crost's case* (4), where the Court say that an administrator made by an Irish Bishop could not bring an action here, as administrator.

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(1) 1 Hag. 9 Ecc. Rep. 625.

(2) 4 Hagg. Ecc. Rep. 405.

(3) 42 R. R. 176 (4 My. & Cr. 76).

(4) Godb. 33.

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The question, therefore, is reduced to this single point, whether the plaintiff, suing a defendant in England in an English Court of law, having clothed himself with a prerogative administration, must also show, in addition thereto, that he has taken out letters of administration in the spiritual Court of Ireland, or whether the *bona notabilia* found in Ireland are not in contemplation of law the same as if found in any other place out of the realm, as Scotland for instance, or the colonies, or France, or any other foreign country.

And we think no difference can exist, in point of law, whether the suit relates to assets of such intestate which are found in Ireland at the time of his death, or in any foreign country.

Before the Union of Great Britain with Ireland, Ireland was, to many purposes, considered as a foreign country. It was beyond the seas, within the meaning of the Statute of Limitations (21 Jac. I. c. 16, s. 2); it was beyond the seas with respect to the exceptions of disabilities under the statutes relating to fines, the expression "beyond the seas" being used as synonymous with the expression "out of the realm" in the statutes relating to fines (4 stat. 18 Edw. I. and stat. 4 Hen. VII. c. 24). There never was, in fact, [*509] any more connection *between the Courts of Westminster Hall and the Ecclesiastical Courts of Ireland than between those Courts and the Ecclesiastical Courts of any foreign country. No prohibition ever lay from any of the English Courts of law: no certificates from the Bishops of Ireland were ever receivable here. And that the Union of the two kingdoms has made no difference in this respect will appear sufficiently from the judgment of the Court of Common Pleas in the case of *Battersby v. Kirk* (1), where it was held that in the Bristol Dock Act (2), passed since the Union, Ireland was still, notwithstanding the Union, to be considered in parts beyond the seas.

Unless, therefore, some direct authority could be produced upon this point, we see no ground or principle for holding the Irish administration to be necessary in the English Court. But no such authority has been cited. The case of *Shaw v. Stoughton* (3), upon which reliance appears to have been placed, does not appear to us to bear out the proposition contended for by the defendant below. In one sense, indeed, it is properly laid down in that case that,

(1) 2 Bing. N. C. 584; *S. C.* 3 personal, public), s. 38.
Scott, 11.

(3) 2 Lev. 86; *S. C.* 3 Keb. 163.

(2) 43 Geo. III. c. xi. (local and

under the circumstances therein supposed, several administrations must be committed, one for the goods in England, another for the goods in Ireland; for no administrator could sue in the English Courts, in respect of the personal estate, wherever it was found at the death of the intestate, without an English administration. Nor, again, could any administrator sue in the Courts of Ireland without an Irish administration. And, in that sense, and to that extent, it is true there must be two administrations. But, supposing the Irish debtor to come within the *jurisdiction of the English Courts, whether the administrator under a prerogative administration in England must take out letters of administration in Ireland also, to enable him to sue in England because the debt due from the defendant was *bona notabilia* in Ireland, is a point on which the case cited furnishes no decision. Upon the authority of that case, indeed, if the administrator under an Irish administration had received this debt, and given a release for it, it would have been a bar to any demand on the part of the administrator in England, as is laid down in *Danyel v.* — (1): but, not having done so, the question is still open whether the administrator under the English letters of administration can recover the debt.

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And, upon the general ground before stated, that assets in any diocese in Ireland are to be considered as assets abroad, when the administrator sues in an English Court under a prerogative administration, we think the plea is bad; and, consequently, that the judgment of the Court below should be reversed.

Judgment reversed.

(ERROR FROM THE QUEEN'S BENCH.)

BOORMAN AND OTHERS *v.* BROWN (2).

(3 Q. B. 511—527; S. C. 11 L. J. Ex. 437; 2 G. & D. 793.)

Declaration, in case, stated that defendant was an oil broker, and that plaintiffs, linseed crushers, retained him, as such broker, to sell and deliver for them 30 tuns of linseed oil, according to the contracts of sale, to such persons as should purchase, for commission and reward to defendant in that behalf; which retainer he accepted: That he, as such broker, in

1841.
May 29.
1842.
June 21.
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(1) Dalison, 76; S. C. as *Daniel v. Luker*, 3 Dyer, 305 a, pl. 58.

(2) Affirmed in the House of Lords, s. n. *Brown v. Boorman*, 11 Cl. &

Fin. 1; and followed in *Baylis v. Lintott* (1873) L. R. 8 C. P. 345, 349, 42 L. J. C. P. 119; and *Hyman v. Nye* (1881) 6 Q. B. D. 685, 689.—A. C.

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pursuance of the retainer, made a contract between plaintiffs and P., by which plaintiffs sold to P., and he bought from them, the 30 tuns, at the price &c., to be delivered by parcels at a place and times named in the declaration, each parcel to be paid for in ready money: That plaintiffs consigned two of the parcels to defendant, and he delivered them to P. on payment: And that, after the making of the contract, and in pursuance thereof, and of the retainer, plaintiffs consigned to defendant, as such broker, the residue of the 30 tuns, to be delivered by him to P. on payment: that the oil arrived &c., of which defendant had notice, and took upon himself the delivery according to the contract: and thereupon it became and was defendant's duty, as such broker as aforesaid, to use all reasonable care that the oil should not be delivered to P. or any other person without the price being paid to defendant according to the contract: Yet defendant, not regarding such duty, did not use reasonable care &c. that the oil should not be delivered &c. without the price being paid, but neglected and refused so to do, and so negligently and carelessly behaved in the premises, that, by defendant's mere carelessness and negligence, the last mentioned oil was delivered to H. & Co. without the price being paid, by P. or any person, to defendant: by reason whereof, and of P. having become bankrupt and unable to pay, plaintiffs lost the said oil, and the price thereof &c.

Held by the Court of Queen's Bench, after verdict for plaintiffs:

That the duty was laid in the declaration as resulting from the defendant's character of broker: but that the duties of a broker as defined by statute and common law did not include those said to have been violated by the defendant. Judgment arrested.

Held by the Court of Exchequer Chamber on error:

That the duty resulted from an express contract described in the declaration, and did not arise simply from the defendant's character of broker.

And that, for the breach of such duty, an action of tort lay.

Judgment reversed.

THE plaintiffs in error declared in the Queen's Bench against the defendant in error:

For that, whereas before and at the time of the committing, &c. the said defendants carried on the trade or business of linseed crushers, at Branbridges, in the county of Kent, and defendant during all that time carried on the trade or business of an oil broker, at London aforesaid; and whereas also, before the time of the committing, &c., *to wit on, &c., plaintiffs had retained and employed defendant, as such broker as aforesaid, to sell at London aforesaid, for and on behalf of them, plaintiffs, certain quantities, to wit 30 tuns, of linseed oil, and to deliver the same in the port of London aforesaid, according to the terms of the contract or contracts of sale, to such person or persons as should become the purchaser or purchasers thereof, for certain reasonable commission and reward to defendant in that behalf, which retainer and employment defendant then accepted: and whereas also, before the committing, &c., to wit on, &c., defendant, as such broker as aforesaid, in pursuance

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of the said retainer and employment, and being duly authorised by plaintiffs and one James Graham Peacock in that behalf, made a certain contract between the said plaintiffs and the said J. G. Peacock, whereby plaintiffs sold to the said J. G. P., and the said J. G. P. purchased of plaintiffs, the said 30 tuns of linseed oil at the price of 42*l.* 10*s.* per tun, usual allowances, to be delivered in the river Thames, 10 tuns the last fourteen days in March then next, 10 tuns the last fourteen days in April then next, 10 tuns the last fourteen days in May then next, and the amount of each parcel to be paid for from delivery in ready money less 2½ per cent. discount; which said contract the said plaintiffs and J. G. P. then respectively accepted: and whereas also, after the making of the said contract, plaintiffs, in pursuance thereof, consigned to defendant, at London aforesaid, in the last fourteen days of March and April respectively, two several parcels of linseed oil of 10 tuns each, to be delivered by him to the said J. G. P. upon the price of the amount thereof being paid by the said J. G. P. to defendant in ready money, less 2½ per cent. discount, *and defendant then delivered the same respectively to the said J. G. P. upon such payment thereof being so made: and whereas also, after the making the said contract, and in pursuance thereof, and of such retainer and employment as aforesaid, to wit on, &c., plaintiffs consigned to defendant, as such broker as aforesaid, at London aforesaid, by a certain barge or vessel called the *Barham*, 10 other tuns of linseed oil, being the residue of the said 30 tuns comprised in the said contract, to be delivered by said defendant to the said J. G. P. upon payment of the price thereof by the said J. G. P. to defendant; and the said last mentioned 10 tuns of linseed oil, being so consigned, afterwards, to wit on, &c., arrived in London aforesaid on board of the said barge or vessel, of all which the defendant then had notice, and then took upon himself the delivery of the last mentioned 10 tuns of linseed oil according to the terms of the said contract; and thereupon it became and was the duty of the defendant, as such broker as aforesaid, to use all reasonable care and diligence that the said 10 tuns of linseed oil should not be delivered to the said J. G. P., or any other person, without the price thereof being paid to him, defendant, according to the terms of the said contract: Yet defendant, not regarding his said duty, but contriving and intending to defraud and injure plaintiffs, did not nor would use reasonable care and diligence that the said last mentioned 10 tuns of linseed oil should not be delivered to the said J. G. P., or any other person, without the price thereof

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being paid to defendant, but wholly neglected and refused so to do ; and so negligently and carelessly behaved in the premises, that, by and through the mere carelessness and negligence of defendant, the said last mentioned 10 tuns *of linseed oil, after the arrival thereof at London aforesaid, to wit on, &c., were delivered to certain persons carrying on trade under the firm of Messrs. John Hare & Co. at Bristol, without the price for the same or any part thereof being paid by the said J. G. P., or any other person, to defendant ; by reason whereof, and of the said J. G. P. having become a bankrupt, and being unable to pay for the said oil, plaintiffs have lost and been deprived of the said oil, and the price and value thereof : to the damage &c. : and therefore &c.

Pleas. 1. Not guilty. 2. That plaintiffs did not consign to defendant nor did defendant take upon himself the delivery of the said last mentioned 10 tuns of oil in manner &c. 3. That plaintiffs had not retained or employed defendant as such broker as in the declaration mentioned to sell the said linseed oil in the said declaration mentioned, and to deliver the same for commission or reward to defendant in that behalf, nor did defendant accept such retainer and employment, in manner &c. Issues thereon.

On the trial, before Lord Denman, Ch. J., at the sittings in London after Hilary Term, 1839 (1), the plaintiffs had a verdict. *Sir J. Campbell*, Attorney-General, in Easter Term, 1839, obtained a rule to show cause why the judgment should not be arrested. In Michaelmas Term, 1840 (2),

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Cresswell and *Cleasby* showed cause, and *Sir J. Campbell*, Attorney-General, *Kelly* and *Butt* supported the *rule. The argument in error, fully stated in the sequel of this report, makes it unnecessary to detail the argument in the Court of Queen's Bench.

Cur. adv. vult.

LORD DENMAN, Ch. J., in Trinity Term, 1841 (May 29th), delivered the judgment of the Court. After having stated the pleadings, his Lordship proceeded as follows :

The issues have been twice found for the plaintiffs : but we are moved to arrest the judgment for the insufficiency of the declaration.

(1) The cause had been tried before, and a new trial granted : *Boorman v. Brown*, 9 Ad. & El. 487.

(2) November 19th. Before Lord Denman, Ch. J., Littledale, Williams, and Coleridge, JJ.

The argument brought under our review the whole doctrine relating to the different forms of action, in tort and in contract. But it is unnecessary for us to consider how that doctrine ought to be applied generally, because we find this declaration defective in an essential point, even supposing that an action on the case may be a proper remedy under such circumstances as are disclosed. For it must be founded on the violation of some duty ; but here the duty described is that of keeping the goods consigned till they were paid for, and is asserted as resulting solely from the defendant's character as broker. Now the character of a broker is well known to the law : his duties are defined by statutes and by common law, and certainly embrace none to the effect here assumed.

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The objection is not answered by saying that the acceptance and the terms of it are fully set forth independently of the averment of the defendant's duty as a broker. That statement is but an introductory narrative ; and the declaration carefully abstains from charging that the duty resulted from those facts, by confining it to the *duty of a broker. Therefore no breach of duty is alleged ; and no ground of complaint appears on the record.

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The rule for arresting the judgment must of course be made absolute.

Rule absolute.

The plaintiffs brought error in the Exchequer Chamber ; and the case was argued in last Hilary vacation (1).

Cleasby for the plaintiffs in error (plaintiffs below) :

Two objections were taken in the Court below : the first, on which the argument at the Bar proceeded, that the action should have been *assumpsit*, not *case* : the second, which was suggested by the Court, and was the ground of their judgment, that the duty supposed to have been violated was declared upon as resulting solely from the defendant's character of broker, but that the obligations of a broker were defined by law, and did not involve any such duty.

As to the latter objection. The declaration states that the defendant was employed as broker, but does not allege that it became his duty, simply as broker, to take care that the goods were not delivered without payment. It sets forth all the circumstances

(1) February 7th. Before Tindal, Ch. J., Erskine, and Maule, JJ., and Alderson, Gurney, and Rolfe, Barons.

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of the employment, and then states that, by reason of them, “it became and was the duty of the defendant, as such broker as aforesaid” (that is, such broker, employed as aforesaid), to use reasonable care, &c. The duty alleged may not be inherent in the character of broker, but is not inconsistent with it. And, if the duty stated be not strictly *enough connected in averment with the previous allegations, that is no objection after verdict, provided that a duty and a breach of it can be collected, by inference of law, from the whole statement of facts on the record. On this principle the Court of Exchequer Chamber, in *The Lancaster Canal Company v. Parnaby* (1), inferred a duty and a breach from the whole narrative in the declaration. If all the allegations be looked to here, the same result follows. The defendant is retained by the plaintiffs for certain commission and reward; he is employed to sell and deliver goods for them according to the employer’s contract; the plaintiffs contract with Peacock to sell him goods, which are to be paid for on delivery: part of the goods are consigned to the defendant: he acts upon the retainer, and delivers those goods in pursuance of it, and of the contract: the residue is then consigned to him, to be delivered to Peacock on payment of the price: and the defendant takes upon him to deliver these goods also according to the contract. The bailment to defendant, under these circumstances, of itself raised a duty, to take care that the goods should not be delivered to Peacock or to any other person without payment. By his neglect, they were delivered without payment; and by that delivery the price of them became lost to the plaintiffs. The goods were indeed delivered to Hare & Co., not Peacock; but this is immaterial, the gist of the complaint being that they were lost by the defendant’s negligence in the delivery. The general rule applies, “that in all cases where a damage accrues to another by the negligence, ignorance, or misbehaviour of a person in the duty of his trade or calling, an action on the case will lie; as if a farrier kill my horse *by bad medicines, or refuse to shoe him, or prick him in the shoeing, &c.”: Bull. N. P. 73.

It will be objected that the action is really grounded on a contract, and should have been brought in assumpsit. This, however, was not, strictly speaking, a contract, but an employment. A contract cannot be revoked without consent of both parties: an employment, before it is acted upon, may be revoked by the employer. Here it may be said that a contract arose on the

(1) 11 Ad. & El. 230.

defendant's part to deliver only for ready money ; but that contract resulted, by implication, from the duty, which grew out of the retainer. Where a party simply refuses to perform his part of a contract, that is a nonfeasance, and the action will be properly founded on contract ; as if a man undertakes to build a house, and does nothing towards building it. But if he begins to perform the duty, and does it ill, as if the builder constructs the house badly, that is a misfeasance, and the action lies as well on the duty as on the contract. To exercise reasonable care and skill is the general duty of a broker, as appears by the statutes regulating their trade (2 Jac. I. c. 21 ; 6 Ann. c. 16), and is not the subject of particular contract. But suppose that, in addition to the duty, a contract had arisen ; there are many such cases in which, if there has been misfeasance, a plaintiff may sue either on the breach of contract or on the failure in duty. Actions upon false warranty, against attorneys for negligence (1), against ship owners, not being common carriers, and against bailees generally, are among the instances. In *Marzetti v. Williams* (2) *the action was framed in tort, against bankers for refusing to pay their customer's cheque though furnished with funds ; the Court held it to be rightly brought, though the tort arose out of a breach of contract, and assumpsit would have lain : and the law of that case [was recognised in *Godefroy v. Jay* (3), *Gorett v. Radnidge* (4), *Coggs v. Bernard* (5), *Pozzi v. Shipton* (6), *Burnett v. Lynch* (7), *Hancock v. Gaffyn* (8), *Burnett v. Lynch* (7).]

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Corbett v. Packington (9) and *Orton v. Butler* (10) were cited for the defendant in the Court below. But the first of these was a case of misjoinder of counts ; one being in case, the other distinctly framed in assumpsit. In *Orton v. Butler* (10) the plaintiff had attempted to frame a count as in trover for money had and received.

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Butt, contra :

First : the ground of action here is not misfeasance, but a nonfeasance merely, in not obtaining payment when the last parcel

(1) See *Howell v. Young*, 29 R. R. 237 (5 B. & C. 259), judgments of BAYLEY and HOLROYD, JJ.

(2) 35 R. R. 329 (1 B. & Ad. 415).

(3) 33 R. R. 528 (7 Bing. 413).

(4) 6 R. R. 539 (3 East, 62).

(5) 2 Ld. Ray. 909. 918. "The

reasons are," *et seq.*

(6) 47 R. R. 802 (8 Ad. & El. 963).

(7) 29 R. R. 343 (5 B. & C. 589).

(8) 8 Bing. 358.

(9) 6 B. & C. 268.

(10) 5 B. & Ald. 652.

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of goods was delivered. *Elsee v. Gatward* (1) shows the materiality of this distinction. The obligation here arose out of contract only, not from any relation between the parties independent of it; and the declaration should have been in assumpsit. In Com. Dig. Action upon the case for misfeasance, (A 3), instances are collected in which the action lies, "if any one act contrary to his undertaking:" but none of the cases mentioned resembles this. It is true that where there is a common law duty there may also be a duty by contract, as in the case of a surgeon or of a carrier. But here, if all that relates to contract be struck out, nothing remains. The cases collected in Com. Dig. Action upon the case for a deceit, *(A 7), (A 11), (F 3), also differ from this. Here no deceit is alleged, but only an omission to obtain money as the defendant was required by contract to do. Nor can the wrong here complained of be ranked with the instances of negligence enumerated in Com. Dig. Action upon the case for negligence, particularly (A 4). The acts there stated as examples are in the nature of misfeasance in respect of the particular thing to be done. Here no neglect is alleged in respect of the thing which the defendant had taken upon him to do, namely the delivery of the 10 tuns of oil. The duty alleged, and which is said to have been violated, goes farther than the defendant's undertaking. There is no complaint of a misdelivery; the omission complained of is not obtaining the money for the goods on delivery. It does not appear that, if that had been done, the delivery to Hare & Co. would have been objectionable. All the cases cited for the plaintiffs come within one or other of the descriptions of misfeasance exemplified by Comyns under the heads referred to. In *The Lancaster Canal Company v. Parnaby* (2) a common law duty arose, which, though not properly averred in the declaration, was sufficiently assigned in substance. Here no duty, independent of contract, is shown: and to contend that, wherever there is a contract from which a duty is to be inferred, an action of tort lies, would break down those limits which the Courts have always been anxious to preserve between the several forms of action.

(ALDERSON, B.: What more than nonfeasance was there in *Marzetti v. Williams*? (3).)

The question arising here was not raised in that case, the disputed

(1) 5 T. B. 143.

(3) 35 R. B. 329 (1 B. & Ad. 415).

(2) 11 Ad. & El. 230.

point being whether *the action was maintainable without special damage: and the first count of the declaration grounded the duty on a custom of the bankers in London to honour cheques; which distinguished the case from an ordinary one of nonfeasance. *Rogers v. Head* (1) was cited for the plaintiffs in the Court below: the marginal abstract (2) is, that, “if a man undertake to carry the goods of another to a certain place for hire, and he neglect to do so, an action on the case lies against him, although he is not a common carrier.” But the action there was assumpsit; and the question discussed was, whether the defendant could be charged upon his promise safely to convey and deliver, without an averment that he was a common carrier. “Action on the case,” in that abstract, must mean an action of assumpsit, according to the mode of expression often used in the older books. In *Burnett v. Lynch* (3) there was no covenant between the lessee and assignee, nor any written contract between them which the Statute of Frauds, 29 Car. II. c. 3, s. 4, would have allowed to be enforced. The duty arose independently of contract (as in *Kinlyside v. Thornton* (4) which was cited); and case was the only remedy. In *Gorett v. Radnidge* (5) the defendants had the loading of a hogshead of treacle, and were guilty of misfeasance in the act of loading. In *Pozzi v. Shipton* (6) the defendant against whom the plaintiff recovered was a common carrier; and the ground of decision was, that the action might be considered as founded on the custom of the realm. In *Corbett v. Packington* (7) the second count stated an agreement *by the defendant to take care of the pigs, and redeliver them on request; and LITLEDALE, J. said: “If this count were in tort, it would be bad in itself, for in that case the whole of the defendant’s duty would have been to take care of the pigs, but the undertaking goes beyond that, it is therefore larger than the purposes for which the pigs were delivered. Suppose a written agreement had been entered into the terms of this count, it could never have been contended that a breach of it might be laid in tort, it would be as reasonable to lay in tort a breach of an agreement to convey a house or land.” And BAYLEY, J. said: “The obligation to redeliver arose out of the agreement alone.” (*Orton v. Butler* (8) shows the necessity of keeping forms of action

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(1) Cro. Jac. 262.

(2) 4th ed. 1791.

(3) 29 R. R. 343 (5 B. & C. 589).

(4) 2 W. Bl. 1111.

(5) 6 R. R. 539 (3 East, 62).

(6) 47 R. R. 802 (8 Ad. & El. 963).

(7) 6 B. & C. 268.

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distinct; but, according to the argument for the plaintiffs in this case, the last count there might have been well framed.

Secondly: the duty, as here described, would result from the defendant's character of broker; but, striking out all that is matter of mere contract, there does not appear any duty which the defendant is alleged to have violated.

(TINDAL, Ch. J.: It is admitted that the present obligation does not arise from the defendant's general character of broker.)

Then it will be sufficient merely to refer, on this point, to the observations of the COURT below. (He then read the latter part of the judgment in B. R., *ante*, p. 290.)

Cleasby, in reply:

[*524] There is a fallacy in using the word "nonfeasance" as if it meant simply omission. A charge of negligence is commonly made in such *general terms as are used here; but it is not to be assumed that the delivery itself was proper, and that the only ground of complaint was not receiving payment. That the defendant "negligently and carelessly behaved in the premises" implies a misfeasance. Nonfeasance of a man's duty, where the fault lies in conduct and not in mere omission, is misfeasance: as in some instances in which an action of tort has been held to lie against an attorney: 1 Bac. Abr. 115 (7th ed.), tit. Actions on the case (F) 2.

(ALDERSON, B. mentioned *Godefroy v. Jay* (1).)

In Com. Dig. Action upon the case for misfeasance, (A 3), it is put as an example of misfeasance by acting contrary to the party's undertaking, "if any one undertake to carry goods, &c. for others, and they miscarry, or are lost by his default." "Though he carry them without hire." Yet this might seem a case of mere nonfeasance. In Com. Dig. Action upon the case for negligence, (A 1), it is said: "So an action upon the case lies for a negligence in a man's duty, though it be a nonfeasance; as, if by the negligence of a servant, cattle perish." And, under the same head, (A 4), "For a neglect to do that, which he has undertaken:" "If a man lend his horse, or other profitable cattle to another gratis, he is bound to a strict care; and therefore, if he neglect to take due care of it, an action upon the case lies." The principle of liability is, in these

latter cases, that, the plaintiff having acted in the confidence that the defendant would do something on his part, the defendant's omission is a misfeasance. Permissive waste has the apparent character of nonfeasance, but is actionable as a misfeasance (1). It is *true that in *Marzetti v. Williams* (2) the custom of London was alleged in one count of the declaration : but the ground of the judgment was a breach of duty for which the defendant was liable because of a contract.

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TINDAL, Ch. J. now delivered the judgment of the COURT :

The judgment for the plaintiffs in the Court below (who are also the plaintiffs in error) having been arrested on the ground of the insufficiency of the declaration, the whole question before us turns on the form of the action brought, and on the declaration itself.

The defendant makes two objections to the plaintiff's right to recover in this action. First, that the action is brought for a nonfeasance only, not for a misfeasance, and on that account it should have been, as he contends, an action of contract, not an action of tort : and, secondly, that the duty stated in the declaration does not arise from the facts therein alleged.

That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render : actions against common carriers, against ship owners on bills of lading, against bailees of different descriptions : and numerous other instances occur in which the action is brought in *tort or contract at the election of the plaintiff. And, as to the objection, that this election is only given where the plaintiff sues for a misfeasance and not for a nonfeasance, it may be answered that in many cases it is extremely difficult to distinguish a mere nonfeasance from a misfeasance ; as in the particular case now before us, where the contract stated in the declaration on the part of the broker is, in substance, to deliver the goods of the plaintiffs to the purchaser on payment of the price in ready money, and where, if the broker delivers without receiving the price, the breach of his

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(1) *Butt* here referred to the note (c) 1113, *Elsley's* edition.
on *Kinlyside v. Thornton*, 2 W. Bl. (2) 35 R. R. 329 (1 B. & Ad. 415).

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direct undertaking is as much a wrongful act done by him, that is a misfeasance, as it is a nonfeasance, the distinction between the two being, in that case, very fine and scarcely perceptible. But, further, the action of case upon tort very frequently occurs where there is a simple nonperformance of the contract, as in the ordinary instance of case against ship owners, simply, for not safely and securely delivering goods according to their bill of lading; and as in the case of *Coggs v. Bernard* (1), where an undertaking is stated in the declaration as the ground of action: and, to give no further instance, the case of *Marzetti v. Williams* (2), where the decision, that the plaintiff was entitled to nominal damages without proof of any actual damage, rests entirely on the consideration that the action, an action on the case, was founded on a contract, not on a general duty implied by law.

The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort.

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As to the second objection, we cannot but think the duty, upon the breach of which this action is founded, arises by necessary inference from the terms of the contract between the plaintiffs and the defendant as set forth in the declaration. The defendant is there stated to have been retained by the plaintiffs as their broker to sell certain goods, and to deliver the same according to the terms of the contract to such person as should become the purchaser; and the declaration then proceeds to allege that the defendant, as such broker, made a certain contract between the plaintiffs and one Peacock, whereby he sold to Peacock, and Peacock purchased of the plaintiffs, the oil therein mentioned, at certain times of delivery, the amount of each parcel to be paid for from delivery in ready money: and, coupling together the terms of the particular contract made by the defendant with the terms of the defendant's retainer by the plaintiffs, we think it amounts to an express contract on the part of the defendant to deliver what he sold on the payment of ready money only; and that the duty of the broker arose from this express contract so stated in the declaration, and not simply from his character of broker, which the Court of Queen's Bench appears to have considered to be the meaning of the declaration.

We therefore think the plaintiffs are entitled to the judgment of the Court in their favour.

Judgment reversed.

(1) 2 Ld. Ray. 909.

(2) 35 R. R. 329 (1 B. & Ad. 415).

(ERROR FROM THE QUEEN'S BENCH.)

REG. v. THE MANCHESTER AND LEEDS RAILWAY COMPANY.

(3 Q. B. 528—542; S. C. 3 G. & D. 269.)

1842.
June 14, 21.

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Where a statute authorises a Company to alter turnpike roads, but not to lower any such road unless they lower its whole breadth, and they, in executing the alteration, have lowered a turnpike road in the carriage way only, leaving the footpaths at their former level, whereupon a *mandamus* issues, requiring them to lower according to the statute :

Held, by the Courts of Queen's Bench and Exchequer Chamber, not a good return, the existing carriage and footways being more convenient to the public and to the occupiers of the houses beside and near the road than if lowered as the writ required.

And, where, on traverse of the return and issue thereon, a jury had found that the road, as then existing, was more convenient &c., the Court of Queen's Bench awarded a peremptory *mandamus non obstante veredicto*, and refused to put the prosecutors to seek their remedy by indictment.

Judgment having been given in B. R. that a peremptory *mandamus* should issue, and the prosecutors recover their costs, the Court of Exchequer Chamber (before stat. 6 & 7 Vict. c. 67 (1)), reviewed the judgment on writ of error, and reversed it, differing from the Court below on the construction of the local Act.

MANDAMUS to the above Company, incorporated and invested with certain powers by stat. 6 & 7 Will. IV. c. cxi., local and personal, public, "for making a railway from Manchester to Leeds." The writ recited this Act (parts of sects. 1 and 3), and also sects. 2 and 38 of stat. 7 Will. IV. & 1 Vict. c. xxiv., local and personal, public, "for enabling the Manchester and Leeds Railway Company to vary the line of such railway, and for amending and enlarging the powers and provisions of the Act relating thereto." Sect. 2 empowers them to vary the line; and, by sect. 38, after reciting that "the new line of the said railway will cross the turnpike road leading from Oldham to Rochdale at a different place from that specified in the said recited Act, and near to the new branch of the Rochdale Canal *in the parish of Rochdale, where the said turnpike road is nearly on a level, and it will be necessary to lower the bed of the said turnpike road at the place where the said railway will cross the same, in order to maintain a proper level in the line of the said railway, and to allow of a sufficient space under the bridge whereon the said railway is to be carried across the said turnpike road for the passage of coaches, waggons, and other carriages along the said road, and it is expedient that provision should be made for

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(1) Repealed by 46 & 47 Vict. c. 49, s. 3, but see s. 7.

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preserving a proper level in the line of the said turnpike road:” it is enacted “that it shall not be lawful for the said Company to carry the line of the said railway, or to make the same across the said road, unless the same shall be carried and made at their own expense over the said road, by means of a bridge of the width of thirty feet at the least, for the purpose of forming a clear carriage road of twenty-four feet wide, and a footpath of six feet wide, exclusive of the pillars or piers which may be placed between the footpath and the carriage road, and of the height of eighteen feet at least from the surface of the said road, to the under side of the said bridge, so as to leave a clear and uninterrupted headway under the said bridge of eighteen feet at the least, and the said bridge on the under side thereof shall be made horizontal and not arched, for the whole space of twenty-four feet wide at the least over the said carriage road, and in case it shall be expedient to lower the surface of the said road, for the purposes aforesaid, then it shall not be lawful for the said Company to lower or alter the present bed of the said road, unless the same shall be lowered at their own expense on both sides of such bridge so that when the alteration shall be completed, the ascent on the said *road southwardly from the said bridge, so far as the alterations therein shall extend, shall not exceed one foot in height for every fifty feet in length, and so that the ascent of the said road northwardly from the said bridge shall not exceed one foot in every 100 feet on any part of the said road so to be made or altered, and the said Company shall at their own expense make all new fences, drains and works, and alter all existing ones and relay and reform the said road, and perform all other matters and things that may be rendered necessary for the forming of the said railway,” &c. The writ then stated that the defendants had built such bridge or viaduct, and had excavated and lowered the said road underneath it for the purpose of affording a passage with a requisite headway for carriages under the same, for the distance of 236 yards northwardly from the said bridge, and 201 yards southwardly: that the road, before such excavation, was of the breadth of forty-two feet throughout; and that defendants, in their excavations, had in no part lowered and excavated the said road to its former breadth of forty-two feet, but to the breadth of thirty-five feet only, northwardly, and twenty-four feet southwardly, and had commenced building walls along the sides of the road so lowered, &c., without having made and excavated it to its former and proper width: and that defendants had not reformed the said road in

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a proper and substantial manner, &c. And the writ (after stating a demand by the road trustees, and refusal) commanded the defendants to make and excavate the said road on both sides of the said bridge or viaduct, for so far in length as the excavations thereof by them extended, the whole width of forty-two feet, and to make such alterations in their *works then executed as might be requisite for making and effecting such excavations as aforesaid, and to reform the said road in a proper and substantial manner, according to the Act; or to show cause &c.

The return set forth sect. 94 of stat. 6 & 7 Will. IV. c. cxi., which gave power to the Company to enter lands, and carry on various works specified, “and to do and execute all other matters and things necessary or convenient for constructing, maintaining, altering, or repairing, and using the said railway, and the other works by this Act authorised; they, the said Company, their deputies, contractors, agents, servants, and workmen, doing as little damage as may be in the execution of the several powers to them hereby granted,” and making full satisfaction &c. (1). Also sect. 1 of stat. 7 Will. IV. & 1 Vict. c. xxiv., which extends the powers, authorities, regulations, &c., of the former Act to this Act, except as they are hereby repealed, &c. The return then stated, in substance, that the defendants had lowered the road underneath the said bridge for affording a passage with requisite headway &c., making the ascent northwardly and southwardly as required by the Act of 7 Will. IV. & 1 Vict. That the Oldham turnpike road, in the writ mentioned, did not before the excavation exceed forty-two feet in width including footpaths on the east and west sides: that defendants had lowered and excavated the carriage road to its full former breadth northward and southward from the bridge (thirty feet three inches to thirty-six feet), but had left the footpaths on each side of the road at their former height and level, and as they existed before *the excavation commenced: that they had reformed the road in a proper and substantial manner, &c.: “that the said carriage road and footpaths respectively, as now made and completed, and as they now exist, are more commodious and convenient to the public and the inhabitants and occupiers” of the messuages &c. beside and near to the said road “than the same would be if the same were excavated and lowered to the full breadth of forty-two feet as required by the said writ.” And that

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(1) On the part of the Crown, to sect. 97, which will be found in reference was also made in argument p. 310, *post*.

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defendants have fully complied with the Acts of Parliament as to the making of the alterations and excavations in the said road and reforming the same &c., doing as little damage as may be in the execution of the powers for those purposes granted, &c. (Some other matters were returned, which it is not thought necessary to state.) And for these reasons &c.

The replication tendered several issues, of which the following only are material. 2 and 3. That the defendants have not lowered or excavated the carriage road to its full former breadth, northward or southward of the bridge, in manner and form, &c. 12. That the Company have not reformed the road in a proper and substantial manner &c., in manner and form &c. 13. That the said carriage road and footpaths, as made and completed by the said Company, and as they now exist, are not more commodious and convenient to the public &c., in manner and form &c.; but, on the contrary, are much less commodious &c. 14. That the Company have not fully complied with the said Acts &c., as to the making of the said alterations and excavations in and the reforming of the said road in manner &c. Issues being joined, the return was tried before Rolfe, B., at the Liverpool Summer Assizes, 1840, when a verdict was *found for the defendants on the 10th (1), 11th (1), 13th and 15th (1) issues; also on the 12th and 14th, with an exception, not material here, as to drains: and for the Crown on the other issues. And the jury assessed the damages of the prosecutors at 1s., and their costs at 40s.

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Cross rules for judgment, *non obstante veredicto*, were obtained in the ensuing Term, and were set down in the Crown paper for argument. The case was argued in Trinity Term, 1841 (2).

Sir W. W. Follett, Cresswell, R. C. Hildyard, and Tomlinson,
for the defendants :

Assuming that the defendants have not done what stat. 7 Will. IV. & 1 Vict. c. xxiv. s. 38, requires, still it is found “that the said carriage road and footpaths, as made and completed by the said Company, and as they exist as in the said return above mentioned, are more commodious and convenient to the public, and the inhabitants and occupiers of the said messuages” &c., “respectively, than the same would be if the same were excavated

1) No point material to the report man, Ch. J., Patteson, Williams, and arose on this finding. Coleridge, JJ.

(2) June 2nd. Before Lord Den-

and lowered to the full former breadth of forty-two feet, as required by the said writ, in manner and form as in the said return alleged." The Court will not issue a peremptory *mandamus* to make the road less convenient to the public than it is. "A peremptory *mandamus* is not a judicial writ, founded upon a record, but a mandatory writ, which the Court grants when they are satisfied of the parties' right:" Com. Dig. *Mandamus*, (D 6). The granting it is discretionary; and the Court need not award it, even when the return is insufficient, if it appear that the writ would not have any useful effect: **Rex v. Griffiths* (1). Stat. 3 & 4 Vict. c. 97, "for regulating railways," enacts (sect. 11) that the Board of Trade may direct prosecutions when it shall appear to them that the provisions of the several Acts of Parliament regulating any Railway Company have not been complied with, "and that it would be for the public advantage that the due performance of the same should be enforced:" thus implying that they ought not to be enforced where it would not be advantageous to the public. The prosecutors may proceed by indictment if they think it expedient: the objection raised in *Rex v. The Severn and Wye Railway Company* (2), that an indictment would not secure the object, for which a *mandamus* was prayed, of reinstating the road, would not apply here, if the public are entitled to a carriage road of the width contended for.

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(PATTERSON, J.: I do not see what the form of indictment could be in this case.)

LORD DENMAN, Ch. J.: It might be difficult to indict for making the road more convenient. If the public have a right to what the Act gives, I do not see how we can substitute the opinion of a jury for the legislative regulation.)

(The arguments on the obligation to excavate to the full width, turning entirely on the words of the local Act, are omitted.)

Sir J. Campbell, Attorney-General, *Kelly* and *Starkie*, *contra* :

If the Legislature had intended to make the jury judges of the width to be required, they would have said that the former width might be reduced provided the road were made as commodious to the public as it was before. The London and Birmingham Railway Act, 3 & 4 Will. IV. c. xxxvi., local and personal, public, *had a clause of this kind, sect. 67, which was under consideration in

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(1) 5 B. & Ald. 731.

(2) 21 R. R. 433 (2 B. & Ald. 646).

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Reg. v. The London and Birmingham Railway Company (1): but the balance of convenience to the public from different causes cannot be satisfactorily left to a jury.

(LORD DENMAN, Ch. J.: I asked the jury there whether they had any doubt that contracting a road made it less convenient.)

A jury might be disposed to take into consideration some partial convenience, which would be no answer if the rights of the public in general were interfered with: *Rex v. Russell* (2), judgment of Lord TENTERDEN; *Rex v. Ward* (3). The argument that a *mandamus* ought not to go because the prosecutors might indict, was urged in *Reg. v. The Bristol Dock Company* (4); but the COURT said: "We think, even if such an objection did not come too late after the writ had issued, that it is entitled to no weight. Those who obtain an Act of Parliament for executing great public works are bound to fulfil all the duties thereby thrown upon them, and may be called upon by this Court so to do. If this breach of contract causes a public nuisance also, that cannot dispense with the necessity of a specific performance of the obligation contracted by them."

Cur. adv. vult.

LORD DENMAN, Ch. J., in the ensuing vacation (June 14th), delivered the judgment of the COURT:

This question comes before us upon a return to a *mandamus* directing the Manchester and Leeds Railway Company to excavate a certain part of the Oldham and *Rochdale turnpike road, taken by them to complete their said railway, to the whole breadth of the old road. From the *mandamus* and return it appears that the said Oldham and Rochdale turnpike road was, at the place where the said railway crosses the same, of the breadth of forty-two feet, viz., thirty-six carriage and six feet foot way: and further that, by stat. 7 Will. IV. & 1 Vict. c. xxiv., s. 38, the said Company were to construct the bridge, by which the road was to be crossed, of the width of thirty feet at the least, and also, as the road was to be curved, that the same should be done so that the ascent from the bridge should not exceed the specified amount. The bridge has

(1) 1 Railway Ca. 317.

(2) 30 R. R. 432 (6 B. & C. 566).

(3) 43 R. R. 364 (4 Ad. & El. 384).

(4) 57 R. R. 579 (2 Q. B. 64).

been constructed of a width exceeding the directions of the Act; and the road has been excavated on each side of it, but not to the whole extent of its ancient width.

Upon the said return various facts were traversed; and issues thereon raised have been found by the jury.

Those upon which reliance is chiefly placed on behalf of the prosecution are the second and third, wherein it is found that the said Company have not lowered or excavated the said carriage road to the full former breadth of the said carriage road: and, upon the part of the defendants, the twelfth and thirteenth issues are relied on, upon which the jury have found that the Company have reformed the said road in a proper manner, except as to the drains, and that the road as it now is is more commodious and convenient than if lowered or excavated to the full former breadth of forty-two feet. And the question resolves itself into this, whether the excavation or lowering of the road should be extended to the whole original breadth of forty-two feet, or whether what has been done, which by the return appears to fall short of *that, in the proportion therein specified, is sufficient to satisfy the provisions of the Act. On the one side it has been contended that (as is true) there is no express provision upon the subject; some discretion is necessarily left to the Company; and that the finding of the jury upon the thirteenth issue, to which we have adverted, shows that such discretion has been fairly and beneficially exercised. On the other it has been argued that, as no width is specified except so far as the bridge itself is concerned, it follows that, as to the rest, the road, after the excavation or lowering rendered necessary for the purposes of the Company, should remain of its original width, and that the abridgment of the width (where intended) being expressed is in favour of the latter construction. It follows, therefore, that we are called upon to put an interpretation upon the clause of the Act itself. That clause (7 Will. IV. & 1 Vict. c. xxiv., s. 38) authorises the Company to make the new line of their railway across the road in question, and prescribes the terms and conditions upon which they are permitted to do so. It is declared to be “expedient that provision should be made for preserving a proper level in the line of the said turnpike road;” and further that, in case it shall be necessary to lower the surface of the said road for the purposes aforesaid, it shall not be lawful for the Company to lower or alter the bed of the said road except upon the terms specified. Those terms are, that the same shall be lowered on both sides of the said

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bridge (the bridge prescribed) with a certain ascent each way. It is observable, therefore, that, wherever in this clause the road is mentioned, and more particularly in the clause last cited, the whole road, and not any part of it, is spoken of; and the road is to be lowered on both *sides of the bridge to its full width, for none other than that is alluded to. We must also observe that throughout the clause no mention is made of lowering the road in such manner as to render the same "more commodious and convenient to the public," so as to supersede the necessity of a literal compliance with the terms prescribed by the Act itself.

We cannot, therefore, consider the finding of the jury upon the thirteenth issue, so much relied upon on behalf of the defendants, as sufficient to dispense with a compliance with the language and meaning of the Act.

Judgment, notwithstanding the verdict &c., that a peremptory mandamus issue. And that the prosecutors do recover against the defendants their damages, costs, and charges, &c. (1).

[*539] The defendants brought a writ of error in the Exchequer Chamber, assigning as a cause that the judgment ought to have been given for them, with costs, notwithstanding the verdict on the issues found for the Crown. *The prosecutors joined in error; and the writ of error was argued in this vacation (2) by Tomlinson for the defendants below, and Starkie for the Crown, who mentioned, besides the cases cited below, *Reg. v. The Birmingham and Gloucester Railway Company* (3). In addition to the argument

(1) Judgment was entered up in the following form. "And hereupon" &c., "because it appears to the said Court here that, notwithstanding the verdict found for the said Manchester and Leeds Railway Company on the several issues tenthly," &c., "above joined, still a peremptory writ of *mandamus* ought to issue in this behalf to the said Manchester and Leeds Railway Company: Therefore it is considered and adjudged by the said Court here that such peremptory writ of *mandamus* do issue in this behalf to the said Manchester and Leeds Railway Company. It is further considered and adjudged that the said trustees do recover against the said

Manchester and Leeds Railway Company their said damages, costs and charges, by the jurors aforesaid in form aforesaid assessed, and also the sum of — for their costs and charges by the said Court here adjudged of increase to the said trustees and with their assent, according to the statutes in such case made and provided, which said damages, costs and charges amount to —: and the Manchester and Leeds Railway Company in mercy" &c.

(2) June 20th. Before Tindal, Ch. J., Coltman, and Maule, JJ., Parke, Alderson, and Rolfe, Barons.

(3) 2 Q. B. 47.

(which it is not thought necessary to report) on the effect of the local Acts (1) before referred to,

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Starkie contended that error did not lie on the award of a peremptory *mandamus*; and he cited *Dean, &c. of Dublin v. Dowgatt* (2); *Rex v. The Dean and Chapter of Trinity Chapel, in Dublin* (3); *The Dean and Chapter of Dublin v. The King* (4); *Rex v. Hearle* (5); *Bishop of St. David's v. Lucy* (6).

Tomlinson, in reply :

If the Court of Queen's Bench merely award a peremptory *mandamus* on the return, or hold the return good, error does not lie, because there is no record. *Rex v. Hearle* (5), in this Court, was merely a decision upon the return. But it is otherwise where a special pleading takes place on the return. *This appears from *Dean, &c. of Dublin v. Dowgatt* (2), and from the argument in *The Dean and Chapter of Dublin v. The King* (4). It was observed in the latter case that "here were no costs or damages, which the party was adjudged to pay; and therefore the writ of error could give the party suing it, no benefit to be restored to any thing which he had lost." Here "it is considered" that the prosecutors recover their costs: so far, at least, the defendants are entitled to their writ of error; and, if the judgment is reversed as to costs, either it will follow that the whole must be reversed, or the Court below will have to deal with the writ as they in their discretion may think fit after such reversal. In a matter of temporary urgency it may often be necessary for the Court to grant a peremptory *mandamus* without waiting the result of a writ of error; but it does not follow that error cannot in any such case be brought (7).

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Cur. adv. vult.

(1) Reference was also made, on both sides, to stat. 2 & 3 Vict. c. lv., local and personal, public, ("for extending and for altering the line of the Manchester and Leeds Railway," &c.), sect. 23, which empowers the Company, with the consent of the trustees of any turnpike road, to alter the position or form of any bridge over or under any such road from the position &c. required by former Acts or this Act, "provided that such alteration shall be equally or more convenient to the public," and that the

general directions of the said Acts be observed.

(2) 1 P. Wms. 348.

(3) 8 Mod. 27.

(4) 1 Br. P. C. 73 (2nd ed.).

(5) 1 Stra. 625, 628.

(6) 1 Ld. Ray. 539, 545.

(7) The Court of Error did not specifically notice the question whether error would lie or not, though they disposed of it by reversing the judgment. See now stat. 6 & 7 Vict. c. 67, s. 2.

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TINDAL, Ch. J. now delivered the judgment of the Court. After stating the object of the *mandamus*, the material facts of the case, and the finding of the jury, his Lordship proceeded as follows :

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Upon this state of facts the main question in the case arose, viz. whether the Company were bound by the Act of Parliament referred to in the return to excavate the road to the full width of the former road. On the part of the prosecutors it was contended that not only the carriage road but the footpath also ought to be excavated to the full former width of the road: and the *judgment of the Queen's Bench is in conformity therewith. The question, so far as this point is concerned, appears to be whether the expression in the thirty-eighth section of stat. 7 Will. IV. & 1 Vict. c. xxiv., "the bed of the said turnpike road," is confined to that part of the road which in another part of the same section is called the carriage road, or whether it comprises not only the carriage road but the footpath also. And we are of opinion that, looking to the object and purpose for which the bed of the turnpike road is directed to be lowered, the statute intends no more by that expression than the carriage road. That purpose is to enable carriages to pass with perfect safety by giving them a clear and uninterrupted headway of eighteen feet at the least under the bridge; an object that is perfectly attainable without making, and is wholly independent of, a corresponding alteration in the level of the footway.

But a further question remains: and it was urged that, however the case may be with respect to the footway, the carriage road ought at all events to be lowered to the full width of the former carriage road, which is found by the jury not to have been done. If the section just referred to had contained any express enactment to that effect, it could not be contended that the superior convenience to the public of the road as made would furnish an excuse for a deviation from the express enactment of the statute; but it is admitted that there is no express provision to this effect; nor does it appear to us that there is any sufficient ground for holding that such a provision is to be implied; the expression, "unless the same shall be lowered at their own expense on both sides of such bridge," upon which the Court of Queen's Bench appears to have placed some reliance as tending to show *that the whole road was included, appearing to us to apply, not to the right-hand side and the left-hand side of the bridge as a person passes under it, but to

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the part of the road lowered as it descends to the bridge on one side and ascends from it on the other.

The Company are undoubtedly bound, in making their alteration, to make it in the manner most convenient to the public. This is required, not only by the nature of the powers confided to them, but by the express condition annexed to the exercise of those powers by the statute 6 & 7 Will. IV. c. cxi. s. 94. That statute authorises them amongst other things to raise or sink any roads or ways, and to do and execute all other matters and things necessary or convenient for constructing the railway and works, doing as little damage as may be in the execution of the several powers granted to them: and by the subsequent statute 7 Will. IV. & 1 Vict. c. xxiv. s. 1, those powers are continued, and rendered applicable to all the objects of the latter Act; but, subject to this restriction, of consulting as far as possible public and private convenience, we see no sufficient reason for implying any condition not expressly required by the terms of the thirty-eighth section. As to any argument arising from a notion of inconvenience from the mode in which the works have been performed, that matter is concluded by the finding of the jury, which is full and explicit on the point. (The subsequent part of his Lordship's judgment, which relates to the finding of the jury as to drains, is omitted. The Court of Error held that this part of the verdict could not affect the case.)

Upon the whole, therefore, we think the judgment of the Court of Queen's Bench ought to be reversed.

Judgment reversed.

REG. v. SCOTT AND OTHERS.

(3 Q. B. 543—550; S. C. 11 L. J. Q. B. 254; 2 G. & D. 729; 3 Ry. Cas. 187; 6 Jur. 1084.)

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The Manchester and Leeds Railway Company were empowered by statute (6 & 7 Will. IV. c. cxi.) to make obstructions in public or private roads, for the purposes of their undertaking, doing as little damage as might be: and a subsequent section enacted that, wherever it was found necessary to use that power, they should, before any such road should be cut through &c., make a good and sufficient road instead thereof, as convenient for passengers as the road to be cut through, or as near thereto as may be.

The Company having obstructed a public road without making a new one equally convenient or as nearly so as might be: Held, that they were indictable for a nuisance on the old highway.

The Company, on obstructing the old highway, made a branch in place of it, less convenient in some respects than the former road; but, from the nature of the levels, greater convenience could not have been obtained without an expense very disproportionate to the increase of accommodation.

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The Judge left it to the jury to say whether the Company had made a new road as convenient as the old, or as nearly so as might be; observing that the Company were not bound to make it absolutely as convenient if that could be done only by a very disproportionate and unwarrantable expenditure. Verdict, Guilty.

On motion for a new trial, on the ground that the finding, under the circumstances, was not a reasonable application of the statute,

Held, that no ground appeared for disturbing the verdict.

INDICTMENT for a nuisance by unlawfully placing rubbish and stones, and erecting a wall, on a public highway in the township of Rastrick in the parish of Halifax, Yorkshire, and keeping and continuing the rubbish &c. so placed and the wall so erected. There were three other counts, which it is not material to state. On the trial, before Maule, J., at the York Spring Assizes, 1841, it appeared that the prosecutor was the surveyor of the highways of the township of Rastrick, and the defendants were an engineer and other persons acting on behalf of the Manchester and Leeds Railway Company, under stat. 6 & 7 Will. IV. c. cxi., local and personal, public, "for making a railway from Manchester to Leeds."

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Sect. 94 of that Act empowers the Company, for the purposes of the Act, to make, "in, under, upon, across, or over any lands" or any "streets, roads," &c., "such inclined or other planes," &c., "roads, ways," &c., "cuttings and fences; and also to erect and construct such houses," &c., "and other buildings, engines, machinery, apparatus, and other works and conveniences, *for the purposes of this Act, as they shall think proper;" to divert, and to raise and sink roads, &c., "in order the more conveniently to carry the same over, or under, or by the side of the said railway;" "and to do and execute all other matters and things necessary or convenient" &c., "doing as little damage" &c. (1); and making satisfaction to persons interested: "subject nevertheless to such provisions and restrictions as are herein mentioned and contained."

Sect. 97 is as follows: "Provided also, and be it further enacted, that in all cases wherein, in the exercise of any of the powers hereby granted, any part of any carriage or horse road, or foot road, railway, or tramroad, quay, or wharf, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers or carriages, or for the transporting, carrying, conveying, landing, shipping, or depositing, of any goods or merchandise,

or to the persons entitled to the use thereof, the said Company shall, at their own expense, before any such road, quay, or wharf, shall be so cut through, raised, sunk, taken, or injured as aforesaid, cause a good and sufficient carriage or horse road, railway, or tram-road (as the case may require), to be set out and made instead thereof, as convenient for passengers and carriages, or for the transporting, carrying, conveying, landing, shipping, or depositing of any goods or merchandise, as the road, quay, or wharf to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as may be, and shall cause the same to be put into good and substantial *order and condition, where the former road cannot be more easily restored; and where the road cut through, raised, sunk, or injured, shall be a turnpike road, the substituted road, if temporary, shall be set out and made as aforesaid, and the principal road shall be restored within six months after the commencement of the operation." Then follows a provision for fencing the railway where it crosses or runs near a turnpike road.

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The Company, when making their railway, stopped up the public highway mentioned in the indictment, called Goodier Lane, and made a branch, restoring the communication between the termini formerly connected by that lane, but by a different line. The new road was stated to be in some respects more convenient to the public than the old, but in others less so. The levels of the adjacent land made it impracticable to give a more convenient line consistently with the regulations of the Act, unless at an expense which, it was said, would be unreasonably great, and quite disproportioned to the benefit which would accrue from it to any part of the public.

MAULE, J. directed the jury to find a verdict of Not guilty, if they thought that the Company had done no more damage than was necessary, and had made the road as convenient as the former one, or as nearly so as might be: intimating, as his own opinion, that the road made by the Company could not be deemed absolutely as convenient, even after allowing for the advantages which the public might have gained from it. But he stated that the Company were not, in his opinion, bound to lay out enormous sums of money to procure a slight accommodation to some persons; and that the proper rule seemed to be, that, if they *could not make the road as convenient as before without a very disproportionate and unwarrantable expenditure, they should make it as nearly so as they could. And he left it to them to say whether the new road

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was as convenient as before, or, if not, as nearly so as it might be. The jury found a verdict of Guilty on two counts (including that first mentioned), and Not guilty on the others.

Cresswell, in Easter Term, 1841, moved for a new trial, on the grounds that, as to some of the defendants, there was no case for the jury, and that, upon the whole evidence, the verdict was not justifiable on the principles laid down by the learned Judge. He also contended that an indictment would not lie, because the act charged was one which the statute permitted, and the only ground of complaint was a neglect to fulfil the condition on which the doing of that act was allowed. He argued, that an injunction might have issued to prevent the execution of the work, or a *mandamus* to fulfil the requisitions of the statute; but that no nuisance had been committed. The Court granted a rule *nisi*. In last Trinity Term (1),

Sir F. Pollock, Attorney-General, *Atcherley*, Serjt., *Joseph Addison* and *W. H. Watson* showed cause:

[*547] The law was laid down clearly by the learned Judge: and the jury have applied it to the facts, and found a proper verdict. It is contended that a *mandamus* might have issued; but, if that be so, it does not follow that an indictment will not lie also. And, if a *mandamus* had gone, to make a road as convenient as the former, "or *as near thereto as may be," the return would have raised precisely the question which was tried on this indictment. On general principles of law, the Company became liable for a nuisance when they obstructed an ancient highway: the statute, however, justified them, provided they had fulfilled certain conditions; but, if those had not been fulfilled, they were without justification. No authority has been cited to show that such an indictment as this will not lie. *Rex v. The Regent's Canal Company* (2) proves, on the contrary, that, if a Company acting on statutory powers deviate from them, and in so doing obstruct a highway, they may be indicted.

(WILLIAMS, J. mentioned *Rex v. Pease* (3).)

(1) June 4th. Before Lord Denman, Ch. J., Patteson, Williams, and Coleridge, JJ.

(2) Cited in *Reg. v. The London and Birmingham Railway Company*, 1 Railway Cases, 323. See 2 Q. B. 55, and

note (c), *ibid.* And see, as to proceedings against a corporation, *Reg. v. Birmingham and Gloucester Railway Co.*, p. 207, *ante*.

(3) 38 R. B. 207 (4 B. & Ad. 30).

There the local Act gave an express and unqualified protection. Here the protection is conditional, and the Company have violated the condition. It is as if no statute existed.

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Sir W. W. Follett, Solicitor-General, *Baines* and *Tomlinson*,
contra :

On the undisputed facts, the verdict was wrong. The jury were bound here to apply the same reasonable rule of construction as was adopted by this Court in *Rex v. Pease* (1), judging of the intention of the Legislature by the subject-matter and the circumstances of the case. And it is for the Court to say, whether the jury have properly done so in the present instance. The making of this railway was the paramount object of the Legislature: the provisions as to other ways were subordinate. The case was not like those in which the whole proceeding contemplated is to replace one road by another *equally good. Here the principal object was to be accomplished; the secondary ones as nearly as circumstances would admit. As to the form of proceeding: by stat. 6 & 7 Will. IV. c. cxi., sect. 94, the Company were empowered to disturb the ancient highways; and then a distinct section (97) directs how, in the case of their so doing, they shall provide for the public accommodation. The words used are, "before any such road" &c. "shall be so cut through" &c.; and this may apply to a temporary diversion; but the permanent substitution of a new road equally convenient with the former cannot, from the nature of the thing, be a condition precedent to any obstruction of the old road.

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(PATTERSON, J.: There is a distinct provision in sect. 97 for the case of a road temporarily substituted.)

The indictment here is, in effect, not for doing the acts pointed out in sect. 94, but for disobeying the directions of sect. 97; and the indictment should have been preferred, if at all, for the latter offence, in the terms of the Act, and according to the truth. As this indictment is framed, the defendants are charged with obstructing the former road, but tried for not making a new one equally convenient. The prosecutor might have obtained an injunction, or might have proceeded by *mandamus*. * * *

The Court suggested that the parties should consider of an arrangement.

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No agreement having been come to,

LORD DENMAN, Ch. J. now delivered the judgment of the COURT :

The defendants were convicted of a nuisance in obstructing a highway. They pleaded Not guilty, and proved, on the trial at York, that the obstruction was caused by the exercise of certain powers conferred on the Leeds and Manchester Railway Company by their Act of incorporation. Their offer to remedy the evil appeared to us so reasonable that we pressed the prosecutors to accept it, and hoped to be spared the necessity of deciding the question of law by which the defendants sought to show that what they have done is lawful. The prosecutors, however, who are the surveyors of the highways, crave our judgment on this point.

The work complained of as a nuisance, and undoubtedly making one, is the cutting through of the carriage road. Now there is no question as to their right to do this ; and, though they are required, when they do it, to cause another road to be set out and made instead of it, they argue that they are no longer indictable for a nuisance in doing the lawful act, however they may for disobedience of the law in neglecting to substitute another. The prosecutors reply by referring to the section (97) which requires the Company to cause the new road to be made before they cut through the old. But the Company rejoin that, from the state of the earth there, it was impossible to do this, and could not be intended by the Legislature. This argument we think inadmissible, for reasons too obvious to require a full statement of them. The Company have done what the Act legalises only on a condition which they have not performed. They stand convicted of the nuisance, and show no justification. The verdict will therefore not be disturbed, but we still hope that the parties may consent to an arrangement useful to the public.

Rule discharged.

1842.
June 23.
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GARDNER v. M'MAHON (1).

(3 Q. B. 561—568 ; S. C. 11 L. J. Q. B. 297 ; 2 G. & D. 593.)

Defendant having pleaded the Statute of Limitations, plaintiff proved, in answer, that, before six years had elapsed from the contracting of the debt, and within six years before action brought, defendant wrote to him as follows.

“ I do not desire that you or any one of my creditors should lose what I owe them ; on the contrary, it is very much my wish not only to pay my

(1) Cited in *Sheet v. Lindsay* (1877) 2 Ex. D. 314, 316, 46 L. J. Ex. 249.—A. C.

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debts but interest upon them if I can. As you have mentioned the Limitation Act, I answer at once, that I am ready to put it out of my power to take advantage of that Act, and will immediately give you my note for whatever amount is due to you. To pay you now or within the year I am utterly unable. I really have not, as you imagine, received 600*l*." "It is of course indispensable that the exact sum I owe you should be fixed, whether you accept my note or not. I have clearly shown you in a former letter, that your account is not in accordance with the estimate upon which you agreed." "If you really cannot produce the original estimate, or the rough draft of it, it certainly is reasonable that some (and considerable) deduction should be made from your charges." (Details as to this were then stated.) "You will perhaps say, what deduction you are prepared to make: and I shall be glad if it be such as will allow me, with justice to my other creditors, to give you my note for the amount, or, if it be possible, to borrow it from a friend, which I have a hope of doing, and wipe the account entirely out of your books." "I am fully sensible of, and thankful for, the forbearance you have shown; but I cannot move a step in the way to give you satisfaction, and do justice to my other creditors, until the sum actually due to you be ascertained."

Held, that the letter contained an unconditional promise to pay, and prevented the Statute of Limitations from operating.

DEBT for work and materials, and on an account stated. Plea (among others), that the causes of action did not accrue within six years. Issue thereon. On the trial, before Patteson, J., at the Middlesex sittings in Michaelmas Term, 1841, it appeared that the plaintiff's claim was for the expenses of engraving and preparing for publication a map of the Island of St. Christopher's, in 1830 and 1831; and it became a question whether or not the following letter, written by defendant to plaintiff within the six years (October 28th, 1835), was sufficient to prevent the operation of the statute.

"SIR,—Mr. Anderdon has been so obliging as to mention what passed between you and him some days ago; which is the occasion of my troubling you with this letter.

"I do not desire that you or any one of my creditors should lose what I owe them; on the contrary, it is very much my wish not only to pay my debts but interest upon them also if I can. As you have mentioned *the Limitation Act to Mr. Anderdon, I answer at once, by saying that I am ready to put it out of my power to take advantage of that Act, and will immediately give you my note for whatever amount is due to you. To pay you now or within the year I am utterly unable. I really have not, as you imagine, received 600*l*. for the proceeds of the map, nor any thing like that sum, the subscribers in the West Indies, with very few exceptions, having failed to pay their subscriptions.

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"It is of course indispensable that the exact sum I owe you should

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be fixed, whether you accept my note or not. I have clearly shown you in a former letter that your account is not in accordance with the estimate upon which you agreed to the work. That estimate, I again say, I have almost a distinct recollection of having, at your request, returned to you, in order that you might make a copy for yourself. The amount of it, exclusive of the extra charges mentioned in your account, was a sum, as nearly as I recollect, between 120*l.* and 130*l.* Now, if you really cannot produce the original estimate, or the rough draft of it, it certainly is reasonable that some (and considerable) deduction should be made from your charges. It is impossible not to see the necessity for this if you refer to the estimate you sent in (and which I still have), when it was contemplated to publish upon eight sheets of copper, and compare that estimate with the charges you have made when only four sheets of copper were used, and a proportionate quantity of paper. This being the case, the expense would of course be reduced nearly one half, as you yourself said at the time, and as your missing estimate afterwards clearly showed. Under these circumstances, you will perhaps say, what deduction you *are prepared to make : and I shall be glad if it be such as will allow me, with justice to my other creditors, to give you my note for the amount, or, if it be possible, to borrow it from a friend, which I have a hope of doing, and wipe the account entirely out of your books. I will not close this letter without repeating that I am fully sensible of, and thoughtful for, the forbearance you have shown ; but I cannot move a step in the way to give you satisfaction, and do justice to my other creditors, until the sum actually due to you be ascertained. Please to direct your answer to me at " &c. " I am " &c.

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(Signed by defendant).

" P.S. I have referred to the estimate you sent me when it was designed to publish upon eight sheets of copper,

The expense was then to be	-	-	-	-	£242	5	0
Your charges (exclusive of extras), when only four sheets of copper and half the quantity of paper were used, amount to	-	-	-	-	234	13	0
Making a difference of	-	-	-	-	£	7	12 0

" I put it to yourself, can this be right ? "

The learned Judge thought the letter sufficient upon the whole ; though he admitted that the latter part, from the words " but I

cannot move" &c., raised a question whether the promise implied was not conditional: and he reserved leave to move to enter a nonsuit. Verdict for plaintiff.

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Cowling, in Michaelmas Term, 1841, obtained a rule *nisi* for entering a nonsuit.

Kelly and *Barstow* now showed cause:

(LORD DENMAN, Ch. J.: The defendant acknowledges a debt, but *says it is not so much as the plaintiff claims. Is not that an admission, subject to the opinion of the jury as to amount?)

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Colledge v. Horn (1) is in point. *Morrell v. Frith* (2), which was cited in moving, is distinguishable. There the letter contained neither a promise nor even an acknowledgment; and, when it was written, the six years had expired. An acknowledgment made after the six years, if accompanied by a condition, cannot take effect as a new promise, unless it be shown that the condition has been fulfilled. But here the six years had not elapsed; and the defendant's declaration, that he will put it out of his own power to take advantage of the statute, prevents any subsequent part of the letter from operating as a condition. *Bird v. Gammon* (3) shows that, where there is a direct acknowledgment, with a promise to pay, the statute is barred, though the sum be not ascertained, and though the debtor professes to rely upon particular means of payment which may or may not prove available.

Cowling, *contra*:

An acknowledgment, to take a case out of the statute, must imply such a promise as would give a new cause of action. It need not ascertain the amount to be paid; but it must be unconditional, or, if there be a condition, it must have been fulfilled: *Tanner v. Smart* (4). Here the defendant annexes a condition, that a proper estimate be taken of the amount due. He does not express willingness to have that point settled by a jury, but puts himself forward as the person to be satisfied before the promise shall have any effect. There is no ground for the distinction *taken between promises made before and after the six years have elapsed. [He cited *Morrell v. Frith* (2), *Colledge v. Horn* (1), *Bird v.*

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(1) 28 R. R. 606 (3 Bing. 119).

(3) 43 R. R. 839 (3 Bing. N. C. 883).

(2) 49 R. R. 659 (3 M. & W. 402).

(4) 30 R. R. 461 (6 B. & C. 603).

GARDNER *Gammon* (1), *Waters v. The Earl of Thanet* (2), *Poynder v. M^cMAHON*. *Bluck* (3), *Lloyd v. Maund* (4), and *Hartley v. Wharton* (5).]

[566] LORD DENMAN, Ch. J. :

The question is, whether the letter of October 28th contained an acknowledgment implying such a promise to pay as would take this case out of the Statute of Limitations. I think there was such a promise, and that it was not necessary to limit it by terms fixing a time of performance. When the debtor says, before the six years have elapsed (which appears to me an important circumstance), "I will waive the statute," it may well be supposed that the creditor on his part has forborne to sue relying upon this undertaking as preserving his right of action in future if it should be wanted. The defendant here may have meant, by some expressions in the letter, "As soon as I know the amount which will be due, I will give you my note:" so that the promise, as far as this part goes, may have been, not a promise to pay, but a promise to give a note on being satisfied as to the amount: and the question will then be, whether the letter contains a promise independent of that condition. I think *it does, and that the rest of the statement is only a mode of settling how the defendant shall provide at the same time for paying this party and his other creditors. Our present decision may be open to comment hereafter; but, where ambiguous expressions are used, we must give them the best interpretation we can: and, if an acknowledgment and a promise appear, they must have their effect in preventing the operation of the statute.

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PATTESON, J. :

I thought at the trial that there was enough in this letter to take the case out of the statute; and I think so still. The defendant admits something to be due, though he does not agree with the plaintiff as to the amount: but he says, "I will not avail myself of the statute, and will put it out of my power to do so." That, if taken alone, makes a promise. The expressions which follow do not qualify that promise. They only contain a proposal to put the matter into some course of settlement which may be beneficial to all parties: but the effect of the whole is, that, even if the proposal

(1) 43 R. R. 839 (3 Bing. N. C. 883).

(2) 57 R. R. 784 (2 Q. B. 757).

(3) 5 Dowl. P. C. 570.

(4) 2 T. R. 760.

(5) 52 R. R. 547 (11 Ad. & El. 934).

be not accepted, the defendant undertakes to pay. If indeed an action had been brought for not giving the note, it might have been contended that a settlement of amount was a condition precedent. But in the meantime there is the debt itself due, which the defendant acknowledges and promises to pay.

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WILLIAMS, J. :

This letter contained a promise to pay, though no precise sum was fixed : and it is consistent with the cases that such a promise will prevent the operation of the statute. *Colledge v. Horn* (1) is an *instance, the authority of which is not disputed. It is in vain to attempt laying down a rule which shall govern all cases : the Court must interpret each instrument as it comes before them. Difficulties will continually arise, though *Tanner v. Smart* (2) is supposed to have settled these questions.

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WIGHTMAN, J. :

I have had some doubt whether this letter contained more than a conditional promise. But I am of opinion that it does. The defendant admits directly that something is due ; only he wishes the amount ascertained. But, if there is an admission of the debt, and a difference only upon the amount, *Colledge v. Horn* (1) shows that the operation of the statute is barred. Even as to the mode of payment, I think there is no condition stated, but only a suggestion of the course which will be most convenient.

Rule discharged.

BATEMAN AND OTHERS, EXECUTORS OF BATEMAN, v. PINDER.

(3 Q. B. 574—576 ; S. C. 11 L. J. Q. B. 281 ; 2 G. & D. 790.)

An acknowledgment of debt bars the Statute of Limitations, because it amounts to a new promise ; and therefore, if made after action brought, it is no bar.

ASSUMPSIT on a promissory note. Plea, the Statute of Limitations. Issue thereon. On the trial, before Wightman, J., at the Liverpool Summer Assizes, 1841, it appeared that the note was joint and several ; and that, on the 4th of August, 1841, after plea pleaded in the present action, Joseph Binns, one of the makers, paid the attorney for the plaintiffs 1*l.*, saying that he brought it

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(1) 28 B. R. 606 (3 Bing. 119).

(2) 30 B. R. 461 (6 B. & C. 603).

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on account of the note. It was objected that a payment after action brought was no answer to a plea of the statute; and *Tanner v. Smart* (1) was cited: but the learned Judge, on the authority of *Yea v. Fouraker* (2), directed a verdict for the plaintiffs, giving leave to move to enter a nonsuit.

Joseph Addison, in the ensuing Term, moved accordingly:

Yea v. Fouraker (2) is now virtually overruled. The decision there “that an acknowledgment of the debt, after the commencement of the action, takes it out of the Statute of Limitations,” can be supported only on the ground that the new acknowledgment draws down the original promise to a period within the six years. But it is now settled that the acknowledgment operates only as evidence of a promise at that time to pay: *Pittam v. Foster* (3), judgment of ABBOTT, Ch. J.; *Gowan v. Forster* (4), and *dictum* of *PARKE, J., there (5); and a promise, after action brought, could not avail.

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A rule *nisi* was granted.

John Henderson now showed cause:

In *Thornton v. Illingworth* (6), where it was held that a ratification by promise after action brought was no answer to a plea of infancy, the Court distinguished that case from *Yea v. Fouraker* (2), which was not denied to be law. * * *

LORD DENMAN, Ch. J. (7):

This case, when we consider it, is very clear. *Yea v. Fouraker* (2) is acknowledged as an authority in *Thornton v. Illingworth* (6); but the Judges distinguish it from that case. *Yea v. Fouraker* (2) was rightly decided, if, as BAYLEY and HOLROYD, *JJ., lay it down in the subsequent case, the Statute of Limitations takes effect upon the ground that after a certain time it shall be presumed that the debt has been discharged. For, if that be so, an acknowledgment made at any time will rebut that presumption. But in *Tanner v. Smart* (8) the earlier cases were revised, and the doctrine as to presumption of payment repudiated; and it was held that, to prevent the operation of the statute, a distinct promise was necessary. That promise must be before action brought.

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(1) 30 R. R. 461 (6 B. & C. 603).

(2) 2 Burr. 1099.

(3) 25 R. R. 385 (1 B. & C. 248).

(4) 3 B. & Ad. 507.

(5) P. 511.

(6) 2 B. & C. 824.

(7) No counsel in support of the rule was present.

(8) 30 R. R. 461 (6 B. & C. 602).

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It is clear, since the decision in *Tanner v. Smart* (1), that the acknowledgment must be before action brought.

WILLIAMS, J. concurred.

WIGHTMAN, J. :

Part payment is an acknowledgment; and an acknowledgment, though not a promise in terms, may amount to one virtually: but, where it is not made till after action brought, it cannot prevent the operation of the statute.

Rule absolute.

CARR v. FOSTER AND OTHERS (2).

(3 Q. B. 581—589; S. C. 11 L. J. Q. B. 284; 2 G. & D. 753.)

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The "interruption" which defeats a prescriptive right under the Prescription Act, 1832 (2 & 3 Will. IV. c. 71), is an adverse obstruction, not a mere discontinuance of user by the claimant himself.

In a case under sect. 1, if proof be given of a right enjoyed at the time of action brought, and thirty years before, but disused during any part of the intermediate time, it is always a question for the jury whether, at that time, the right had ceased or was still substantially enjoyed.

The inference to be drawn from the facts proved, on this point, is not a "presumption" within sect. 6.

Where a commoner had ceased to use the common during two years of the thirty, having no commonable cattle at the time, but had used it before and after: Held, that a jury were justified in finding a continued enjoyment of the right during thirty years.

CASE. The declaration stated that plaintiff, "before and at the time of the committing" &c., "was, and from thence hitherto hath been, and still is" possessed of a messuage and land, situate &c.; and, by reason thereof, during all the time aforesaid of right ought to have had, and still of right ought to have, common of pasture for all his commonable cows and heifers *levant and couchant* &c., in a certain place, waste or common called Newby Moor, in the parish of Clapham in Yorkshire, every year, at all times &c., as to the said messuage &c. appertaining &c.: the count then alleged a disturbance by driving plaintiff's cattle off the common.

Pleas. 1. Not guilty. 2. That plaintiff was not lawfully possessed of the said messuage and land &c., in manner &c.

(1) 30 B. R. 461 (6 B. & C. 602).

v. *Verney* (1884) 13 Q. B. D. 304, 308,(2) Followed in *Glover v. Coleman* (1874) L. R. 10 C. P. 108, 122, 44 L. J. C. P. 66; commented on, *Hollins*53 L. J. Q. B. 430; *Smith v. Baxter* [1900] 2 Ch. 138, 69 L. J. Ch. 437, O. A.—A. C.

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Conclusion to the country. Issue thereon. 3. That plaintiff ought not, by reason of the possession of the said supposed messuage and land, of right to have had, nor still of right ought &c., common &c. in the said place &c., in manner &c. Conclusion to the country. Issue thereon.

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On the trial, before Lord Denman, Ch. J., at the York Summer Assizes, 1841, it appeared that the plaintiff claimed the above mentioned right of common in respect of a farm called Mealingscales, of which he was tenant: and he proved a continued user of such right by the tenants of Mealingscales for nearly forty years next *before the commencement of this action, except that, about eighteen years back, the owner of the farm had it, for two years, in his own hands, and, having no commonable cattle, made no use of the common during that period. For the defendants it was urged that this cesser of enjoyment during two years defeated the plaintiff's case, which required that the profit should, according to stat. 2 & 3 Will. IV. c. 71, ss. 1 and 4, "have been actually taken and enjoyed" "without interruption for the full period of thirty years," "next before" action brought. The LORD CHIEF JUSTICE overruled the objection, giving leave, however, to move to enter a nonsuit; and he left it to the jury to say whether the tenants of Mealingscales had, substantially, enjoyed the right of common for thirty years next before the commencement of the action. Verdict for plaintiff.

Cresswell, in the ensuing Term, obtained a rule to show cause why a nonsuit should not be entered, or why there should not be a new trial on the ground that the verdict was against the weight of evidence.

Dundas and *Wortley* now showed cause:

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There was a substantial enjoyment of the right during thirty years next before action brought. The tenants of Mealingscales turned on cattle while they had them, and ceased exercising the right only when they had no occasion for it. The statute requires an "interruption" to defeat the title; but that word implies an adverse act of obstruction, not a voluntary intermission. Sect. 4 provides "that no act or other matter shall be deemed to be an interruption," unless "submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person *making or authorising the same to be made:" language wholly inapplicable to the case of a voluntary cesser. The words of sect. 1 referring to the "right of common"

previously mentioned in that clause are that “such right” shall have been enjoyed; the language differing, so far, from that of sect. 2, where it is required that “such way or other matter” shall have been enjoyed. Common is not, in its nature, a thing to be enjoyed continuously: the user must be limited by seasons, and must depend upon the quantity and description of stock which the commoner possesses. The right, therefore, may continue, though enjoyment of the common be suspended. [They cited *Bailey v. Appleyard* (1), *Flight v. Thomas* (2), and *Payne v. Shedden* (3).]

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W. H. Watson and Hugh Hill, contra:

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The plaintiff's case, at the trial, was rested on the statute, not on a common law prescription. Then, the common, here, was not “actually” “enjoyed” for thirty years next before action brought. It could not be so if there was a cesser for two years during that period, whether by interruption or from any other cause. The argument for the plaintiff would apply even if the years in which no user appeared were the first two of the thirty, at least where a previous enjoyment could be shown; or if the right had been intermitted for seven years; or had been *exercised only during the first and thirtieth years, and intermitted during the other twenty-eight. It is hard to say where a line could be drawn.

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(LORD DENMAN, Ch. J.: The same difficulty may be raised by asking how short a period will defeat the right.

PATTESON, J.: Would you say that it must be exercised every hour of the day?)

It must at least be supposed that a right of common will be used at certain periods of the year.

(LORD DENMAN, Ch. J.: By those who have cattle to turn on.)

Sect. 6 excludes all presumption in favour of any claim from proof of the right having been enjoyed for “any less period of time or number of years” than the previous clauses require in the respective instances. There must be an actual taking and enjoying of the right, profit or benefit for the entire period, without interruption. As to this, *Parker v. Mitchell* (4) is in point. It is true

(1) 47 B. R. 537 (8 Ad. & El. 161;
and note, p. i., in same vol.).

(3) 42 R. R. 808 (1 Moo. & Rob. 382).

(4) 52 R. R. 468 (11 Ad. & El. 788).

(2) 52 R. R. 468 (11 Ad. & El. 688).

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that the plea there alleged an enjoyment for forty years next before the commencement of the suit: but the ground of decision was that a period of nonuser defeated the prescriptive right.

(PATTESON, J.: The case turned on sect. 4, which requires the time to be computed back from the commencement of the action. That could not be done, because the user was not brought down by proof to the time of commencing the action. The present case does not turn on sect. 4.)

Payne v. Shedden (1) shows that the right may be exercised constructively, but not that all exercise of it may be dispensed with.

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(PATTESON, J.: I thought there that, if I have a right over another's land, and he, for a time, gives me a consideration for ceasing to exercise it, I enjoy the right while receiving the compensation. The Court *of Common Pleas in *Hall v. Swift* (2) lay down the law in a manner which seems at variance with *Bailey v. Appleyard* (3): but the case seems to have received slight consideration; and the language of the Act is not discussed.)

In principle, the shortest intermission should be as fatal to the right as the longest: but, if it were necessary to draw a line, the manner in which the words "year" and "years" are used in sects. 4 and 6, and other parts of the statute, seems to point out that, if an entire year be wanting to the requisite period, then at least the right is incomplete. The Act, being express in its language, must receive the literal construction notwithstanding any inconvenience or inconsistency which may be suggested as the consequence: this is expressly laid down by Lord ABINGER, C. B. in *Wright v. Williams* (4). There is no ground for the distinction suggested on the other side between the words "right, profit, or benefit" "taken and enjoyed," in sect. 1, and "way or other matter" "enjoyed," in sect. 2. The clauses merely introduce separate provisions for the case of a *profit à prendre* and that of an easement.

LORD DENMAN, Ch. J.:

I am of opinion that the thirty years' enjoyment was sufficiently

- (1) 42 R. R. 808 (1 Moo. & Rob. 382). and note, p. i., in same vol.).
 (2) 44 R. R. 728 (4 Bing. N. C. 381). (4) 46 R. R. 265 (1 M. & W. 77, 98,
 (3) 47 R. R. 537 (8 Ad. & El. 161; 99; S. C. Tyr. & Gr. 375, 399).

made out. There must be some interval in the enjoyment of all such rights; and it must be a question for the jury, in each case, whether the right was, substantially, enjoyed for the requisite period. It has been ingeniously argued that a thirty years' enjoyment cannot have taken place where *there has been a two years' intermission. But the words of sect. 1 are "without interruption," not "without intermission." And the intermission must be a matter open, in every case, to explanation. Sect. 6 enacts that no presumption shall be made in favour of any claim, on proof of the right having been exercised for a less period than that prescribed by the Act in the particular case. But that provision is meant only to encounter presumptions, from an exercise of the right during such an imperfect period, that it was exercised in olden times. The effect of the clause is, that a claimant, proving enjoyment for less than the specified time, shall not, on that ground, carry back his right to a period before that which his proof extends to. But this does not affect the mode of proof: and, where actual enjoyment is shown before and after the period of intermission, it may be inferred from that evidence that the right continued during the whole time.

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PATTERSON, J.:

I think there is no difficulty in the construction of the statute. "Interruption" in sect. 1 must clearly mean an obstruction by the act of some other person than the claimant, not a cessation by him of his own accord. And, when, especially, we refer to sect. 4, which provides that no act shall be deemed an interruption unless "acquiesced in" for one year after the party interrupted shall have had notice, there cannot be the slightest doubt on the point. Indeed the defendants' counsel did not rest the case so much on interruption as on sect. 6. By sect. 4 it is enacted that the period to be relied upon must be one immediately preceding the commencement of the action; and sect. 6 *excludes any presumption from proof of the exercise of right during a less period than the previous clauses require. Formerly an immemorial enjoyment was presumed from proof going back to the extent of living memory; now, by sect. 6, that is no longer permitted. But no difference is made as to the proof of an intermediate user. It is always for the jury to say whether, during any intermediate part of the period, an actual enjoyment has been had. How many times the right has been exercised is not the material question, if

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the jury are satisfied that the claimant exercised it as often as he chose. It is suggested that the argument for the plaintiff might apply equally if there were a cesser for seven years. I am not prepared to say that it would not. It might be that, under the circumstances, the party had no occasion to use the right. The question would always be for the jury. So long an intermission would be a strong piece of evidence against the continued right: but it would be for them to determine. The Act makes no provision for such a case, sect. 6 relating only to the non-presumption of right at a period antecedent to that over which the proof extends.

WILLIAMS, J. :

I am of the same opinion. "Interruption" means an obstruction, not a cesser or intermission, or any thing denoting a mere breach in time. There must be an overt act, indicating that the right is disputed. Before the statute, in cases relating to common, it was very usual to explain the ceasing to turn on cattle by the fact that there were not, at the time, commonable cattle to turn on. No necessary inference arises from a cesser during two, three, or seven years. *In this particular case enjoyment for the requisite period was abundantly made out (1).

Rule discharged.

1842.
June 25.

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DOE D. THE EARL OF EGREMONT v. DATE.

(3 Q. B. 609—621; S. C. 11 L. J. Q. B. 220; 6 Jur. 990.)

On the trial of ejectment against a lessee by a party claiming the reversion, the plaintiff, to prove seisin in G., a late tenant for life, called the executor of G., and required him to produce a book containing an entry, forty years old, of a receipt of rent for the land in question by G.'s steward. It was admitted, on the part of the plaintiff, that the executor (who also was a legatee of large personal property under the will of the tenant for life) would be liable over to the defendant if the plaintiff obtained a verdict, under a covenant for title by G.; and that the action was substantially defended by the executor.

Held that the executor was bound to produce the book.

When a Judge at Nisi Prius has compelled the production of evidence by a witness who objects, *quere* whether the decision can be reviewed in Banc?

EJECTMENT for lands in Somersetshire. The case was tried before Rolfe, B., at the Somersetshire Spring Assizes, 1840. The

(1) Wightman, J. had left the Court.

lessor of the plaintiff, George Earl of Egremont, claimed under the devise of Charles, late Earl of Egremont, who died in 1763, leaving his will dated 30th July, 1761. By the will, lands were devised to George O'Brien, late Earl of Egremont, for life, with limitations over in remainder, under which remainder the lessor of the plaintiff was now entitled as tenant in tail. Certain powers of leasing were also created by the will: and the defendant held under a lease made by the late tenant for life, which (as the lessor of the plaintiff contended, and as was ultimately admitted on the part of the defendant) could not be supported as an execution of the power. The counsel for the plaintiff, in opening the case, told the jury that the real defendant was Colonel Wyndham, the executor of the late *tenant for life, and legatee of a large personal property from him, since it appeared by the lease (which was produced) that the tenant for life, and his executors, were bound to indemnify the lessee under a covenant for title. In order to show that the lands in question were part of the lands devised, and had been the property of the deviser, it was proposed to prove that they had been held by the tenant for life, the late George O'Brien, Earl of Egremont, as landlord. The evidence opened in support of this was a rent book, belonging to the late tenant for life, and now in the hands of his executor, Colonel Wyndham, in which was an entry of the receipt of rent for this property, by the steward of the tenant for life, in 1800. A *subpœna duces tecum*, to produce the book, was served on Colonel Wyndham: and (by consent of the parties) Mr. Murray, Colonel Wyndham's attorney, appeared for him, with it. The book being called for by the plaintiff's counsel, Mr. Murray declined to produce it, unless the Court should be of opinion that he was bound to do so. He was then sworn, and, in answer to the introductory questions of the counsel for the plaintiff, stated that he was attorney for Colonel Wyndham in this action. He objected at first to giving or producing evidence, on the ground of professional confidence: but it was held by the learned Judge (and admitted by the defendant's counsel) that the witness, as he appeared in lieu of Colonel Wyndham, was bound to give such evidence as Colonel Wyndham could have been compelled to give. He then objected to produce the rent book, on the ground that it was a document relating to the title of Colonel Wyndham; *but the learned Judge overruled the objection; and the book was produced. Verdict for the plaintiff.

In Easter Term, 1840, *Bere* obtained a rule *nisi* for a new trial

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on account of this evidence having been produced (1). In this vacation (2),

Sir W. W. Follett, Erle, Crowder and Montague Smith showed cause :

First, even if the witness was not compellable to produce the book, that is no ground for a new trial on the application of one of the parties. The book being, in itself, legitimate evidence, what right has the party against whom it is produced to make the objection? The only person injured, if any, is the owner of the book : but he is not the party making the application.

(LORD DENMAN, Ch. J. : Surely injustice is done to the defendant if that is admitted in evidence against him which ought not to have been admitted. It seems very difficult to say that such a decision is not to be reviewed.)

It is a matter entirely between the Court and the witness. If the witness had chosen to produce the evidence without objection, the defendant would not have been entitled to interfere.

(COLERIDGE, J. : If the Judge at Nisi Prius sustains such an objection improperly, the adverse party is entitled to a new trial.)

[*612] There the party to the suit is prejudiced by the rejection of evidence which he has a right to demand : but, where the objection is improperly overruled, nothing is done to *which the party to the suit has a right to object : and the injury done to the witness, if any, will not be undone by a new trial.

(PATTESON, J. referred to *Marston v. Downes* (3).)

But, further, the ruling at Nisi Prius was correct. Colonel Wyndham, who was represented by the witness, was bound to produce the book. It is no ground for refusing to give evidence that such evidence, when given, will subject the witness to a civil liability. It is true that the Courts will not compel a witness to produce the

(1) This was one of several causes tried at the same Assizes on the same title, in which the verdict was for the plaintiff. Rules for new trials were obtained in several of them, on various points, some common to more than one of the cases. Such points only are

reported as were ultimately relied upon, and considered by the Court to be raised on the evidence and rules *nisi*. See the next case.

(2) June 22nd, 1842.

(3) 1 Ad. & El. 31. See *Davies v. Waters*, 60 R. R. 843 (9 M. & W. 608).

title deeds of his estate; but here the estate does not belong to Colonel Wyndham: nor is the book in the nature of a title deed; if it were, Colonel Wyndham, as executor, would not be entitled to the custody of it. As to his ultimate interest in the cause (assuming such interest, for the purpose of argument), that could give Colonel Wyndham no privilege of withholding the evidence. If he had been asked whether he had seen the tenant for life receive the rents, he could not have refused to answer.

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Kelly, Bere and Butt, contra :

First, the Court will take notice of the objection at this stage. Several cases are collected in 1 Starkie on Evidence, 89 (1), in which it appears that the propriety of the Judge's decision at *Nisi Prius* on such a point has been discussed in Banc; as *Schlencker v. Mossy* (2) and *Doe d. Courtail v. Thomas* (3).

(PATTESON, J.: In the former of those cases the evidence had been withheld at *Nisi Prius*.)

The cases at any rate show that the subject is open to discussion in Banc. *Marston v. Downes* (4) *appears, indeed, to be an authority to the contrary; but there the witness had no interest; here the party compelled to give the evidence, through his attorney, is substantially the party now making the application for a new trial. Even where the Judge directs the witness to produce the evidence, if the witness still refuse, all that the Judge can do is to punish him for a contempt; and yet, if the Judge improperly refuse to order the evidence to be produced, it is admitted that this is a ground for a new trial.

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(PATTESON, J.: Taking that to be so, it shows only that a party to the suit has a right to complain that the Judge has not exercised on his behalf the power which ought to have been exercised: but, where a Judge refuses to protect a witness from giving the evidence, that is not a decision against either party to the cause.

COLERIDGE, J.: Do you say that Colonel Wyndham was so entirely the party to this cause that secondary evidence might have

(1) Third edit.

(2) 27 R. R. 482 (3 B. & C. 789).

(3) 32 R. R. 680 (9 B. & C. 288).

(4) 1 Ad. & El. 31. See *Davies v. Waters*, 60 R. R. 843 (9 M. & W. 608).

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been given of the contents of this book if he had refused to produce it upon notice? Or could his declarations be given in evidence against the present defendant Date?)

It is not clear that those consequences would lead to an absurdity : but perhaps they do not necessarily follow from the view which the defendant takes. The case in this respect has some analogy to that of an action brought nominally against the sheriff, who is indemnified by the party really interested. Colonel Wyndham, though not technically a party on the record, so as to be strictly subject to the liabilities incident to that character, is yet shown, by the case set up on the part of the plaintiff, to be so far the party substantially interested as not to be excluded from complaining of the decision at *Nisi Prius*.

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Then, assuming that the Court will entertain the question, Colonel Wyndham ought not, in such a case as this, to have been compelled to produce the book. The point has been argued as if the production of such a document and the giving parol evidence were subject to the same rule : but that is not so. In 1 Starkie on Evidence, 88 (1), the law is laid down as follows : " There seems, however, in one respect, to be a distinction between the compelling a witness to answer a question orally, and the obliging him to produce a written document. He must answer questions, although the answer may render him civilly responsible ; but it seems that he is not compellable to produce title deeds, or any other documents which belong to him, where the production might prejudice his civil rights. And this is, as it seems, a rule of legal policy founded upon a consideration of the great inconvenience and mischief to individuals which might and would result to them from compelling them to disclose their titles, by the production of their title deeds, or other private documents. The same principle applies where the document is in the hands of an attorney ; he will not be compelled to produce it to be read where the disclosure would be prejudicial to his client." So far, therefore, as written documents are concerned, the exemption is not confined to criminal responsibility, nor to the case of title deeds to real property. Now many cases might be put in which the publication of the contents of this book might be prejudicial to Colonel Wyndham, as executor of the late tenant for life ; as, for instance, if a question arose respecting rent due in the time of the tenant for life. *Sampson v. Swettenham* (2) is referred

(1) Third edit.

(2) 21 R. R. 268 (5 Madd. 16).

to by Mr. Starkie: *and *Cocks v. Nash* (1), *Street v. Brown* (2), *Miles v. Dawson* (3), and *Laing v. Barclay* (4), show the extent of the protection. And the principle is strongly upheld in *Pickering v. Noyes* (5), and in *Ratcliffe v. Bleasby* (6). The exemption, it is true, does not exist where the party calling for the document is the party who has the beneficial interest in it; but there is no pretence for contending that the lessor of the plaintiff has any interest in this book. By stat. 46 Geo. III. c. 97, a witness cannot refuse to answer a question on the ground that the answer may show that he owes a debt or is otherwise subject to a civil suit; that statute does not, however, refer to the production of documents. In *Rex v. Woburn* (7) the Court of Queen's Bench held (before stat. 54 Geo. III. c. 170) that a rated inhabitant of a parish could not, in a settlement case in which the parish was appellant, be compelled by the respondents to give evidence, though he was not a party actually named on the record. Here the interest of Colonel Wyndham is not only admitted but insisted on by the counsel for the lessor of the plaintiff.

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LORD DENMAN, Ch. J.:

With respect to the preliminary point, I may perhaps have expressed myself too strongly during the argument, considering the case of *Marston v. Downes* (8), which was not present to my mind at the moment. I must own, however, that *I am not altogether satisfied with the principle of that decision. Perhaps I might be inclined to put the argument thus. A party to a suit has a right to insist that no evidence shall be produced against him, except such as can be given legally. Now, if a witness be compelled by a Judge at Nisi Prius to produce a title deed which he is legally entitled to withhold, it strikes me that the party to the suit against whom the evidence is produced is affected by that which ought not to have been laid before the jury. One sees that such a question might become of the utmost importance in criminal cases. I consider the authority which the Judge exercises to differ materially from that exercised by persons for whom the

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(1) 9 Bing. 723. *Kelly* referred also to the language of TINDAL, Ch. J., at p. 726, as showing that the Court in Banc would review the decision of the Judge at Nisi Prius.

(2) 6 Taunt. 302.

(3) 1 Esp. 405.

(4) 25 R. R. 430 (3 Stark. 38).

(5) 1 B. & C. 262.

(6) Stated 38 R. R. 552, 556 (3 Bing. 148).

(7) 10 East, 395.

(8) 1 Ad. & El. 31.

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law is not strictly responsible. I should, therefore, wish to have this question fully discussed, if it should ever arise again. One consequence of holding that the decision of the Judge at Nisi Prius cannot be reviewed in Banc might be, that on all occasions the Judge at Nisi Prius would compel the production of the document; because it is always desirable, with a view to getting at the truth, that all evidence should be produced which is not in itself objectionable, and the Judge may feel that, if he compels the production of the document, his decision will be final; but that, if he does not, the whole question will be liable to be raised again.

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These observations, however, are only thrown out for the purpose of indicating a doubt upon a question of considerable importance, which seems to me to have arisen quite unnecessarily in this case. For I have not the least doubt that the witness was compellable to produce the book in question. He possessed it in the character of executor of the late tenant for life; when *produced, it proved the fact of payment of rent to his testator. Why was the witness not to prove that fact, either by his personal knowledge, if the party calling him chose to question him, or by any paper which he might possess? Such a paper was not a title deed, nor within the protection of the rule which exempts witnesses from producing documents in the nature of title deeds. The production of the paper was a mode of proving the fact: that this fact might be injurious to some interest of his own, furnishes no reason for his not producing the book. I consider him strictly as a witness. I cannot allow that, because a learned counsel for the plaintiff says, "such a one is the real party to the cause, and I shall put him in the witness box," that deprives the counsel of the right to treat such person as a witness in every respect. He is indeed an interested witness: but he does not therefore possess the privilege, which a party to the cause would have, of refusing to give evidence. In fact that privilege, while it entitled the party to refuse to lay the document before the Court, would give the opposite party the right of producing secondary evidence.

It seems to me, therefore, that the preliminary point does not arise; and I am sorry that I have been under the necessity of saying any thing upon a point which is not necessarily before the Court: but, it having come before us, I thought it my duty to express the doubt which I have felt upon it. I would not express more than a doubt, considering the great authority of the decision

of which I was the organ, and the opinion which my learned brothers entertain on the subject. On the other point I do not feel the slightest doubt.

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PATTERSON, J.:

Colonel Wyndham, if he had been himself the witness (and of course Mr. Murray stands in the same situation), would have been bound to produce the document. The learned Judge was therefore right in what he did. This is really not a document approaching in character to a title deed. After all, the matter comes only to this, that Colonel Wyndham was very desirous of keeping back the evidence, because he was bound to indemnify the defendant if the plaintiff got a verdict. But that does not make him a party to the record, nor prevent the lessor of the plaintiff calling him as a witness, though it might preclude the defendant from calling him, on the ground of interest. Under the *subpoena duces tecum* he must produce such documents as are legitimate in the cause. I can find no rule of law which prevents a man from producing any thing, except in the case of title deeds. Certainly it is no excuse that the production of the evidence will subject him to a civil action.

As to the question, whether the Court can review the decision of a Judge at Nisi Prius on such a point, I was anxious in the course of the argument to draw the attention of the defendant's counsel to what appears to me an important distinction. Whether *Marston v. Downes* (1) was rightly decided may be a fit subject for discussion. But it by no means follows that, because the Court will review the decision at Nisi Prius when the Judge has refused to compel the witness to produce the document, his decision must be reviewed when he has compelled the production. The parties stand in a very different situation in the two cases. The party who calls for the *evidence has an interest in the production of it; but the opposite party has no interest in the privilege of the witness, and cannot complain of legitimate evidence being brought against himself. If the Court will review a decision disallowing the privilege, that will be for the sake of the witness: I do not see how it can be done for the sake of the party.

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WILLIAMS, J.:

I decide on the ground that Mr. Murray, representing Colonel

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Wyndham, was strictly a witness, and not a party to the cause. With respect to the question, how far the decision of the Judge at Nisi Prius can be reconsidered in Banc, it must be recollected that such a discussion can take place only after the evidence has been received or rejected. Now on this point there are several authorities. The earliest which I recollect was a very well considered case, *Legatt v. Tollervey* (1). It was at one time considered that an indictment could not be produced in evidence without the order of the Court of which it was a record, or the *fiat* of the *Attorney-General*; and in *Legatt v. Tollervey* (1) the Judge at Nisi Prius refused to allow an indictment to be given in evidence for want of proof of such authority, and nonsuited the plaintiff. But the Court of Queen's Bench set aside the nonsuit, on the ground that, although the officer who produced the indictment might be guilty of a contempt, yet the indictment, if he chose to produce it, was admissible in evidence, however obtained. But there is an obvious distinction, as has been pointed out, between cases where the privilege has been allowed and those where it has been disallowed.

[620] COLERIDGE, J. :

I also desire to found my opinion simply on the consideration, which is enough in the present case, that Colonel Wyndham was a witness, and not a party to the cause. The counsel for the defendant can scarcely maintain that Colonel Wyndham was so far the party to the cause, that his declarations would be evidence against the nominal party, or that secondary evidence could be given of the contents of documents which he might refuse to produce. He was merely a witness very much interested in supporting the defendant, on the ground of the probability (not certainty) that, in the event of a verdict passing against the defendant, damages, or something equivalent, might be obtained against himself. If the counsel for the plaintiff chose to take on himself the risk of calling such a witness, there was nothing to preclude him from so doing. Then we are next to consider the character of the document itself. It was not, in the most extended sense of the word, a title deed: nor, as I understand the passage cited, can it come within the class which Mr. Starkie designates as "any other documents." The production could not impeach or weaken the possession of any thing that Colonel Wyndham had; nor was it a document by which

(1) 12 B. R. 518 (14 East, 302).

he himself could directly recover any thing. It was dated as far back as 1800. The utmost that can be said of it is, that, if Colonel Wyndham were endeavouring to recover rents left unpaid at the death of the late tenant for life, this document might be subsidiary. We do not even in any way prevent him from making use of it hereafter. I feel confident that there can be no authority for upholding the privilege in such a case as this.

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But, on the other question, I must say that I entertain *great doubt whether we could have reviewed the decision of the learned Judge. There is a very broad distinction between cases where the privilege has been allowed, and those where it has been disallowed. In the former case, a party has been precluded from proving that which he was entitled to prove. In the latter case, the party whose privilege has been disallowed has no *locus standi* in Banc. I recollect a case on the Western circuit, in which I was retained as counsel for a witness, to resist his being compelled to produce some evidence. Mr. Justice PARK, who was perfectly familiar with the course of practice at Nisi Prius, would not for a moment allow me to appear in that character. He said, "I must be left to take care of the witness, and I alone; I shall not hear counsel on his behalf." If counsel cannot be heard for a witness at Nisi Prius, certainly he cannot be heard for that witness in Banc. And, if the witness cannot call upon us to review the decision, can the party to the cause do so? Legitimate evidence has been produced against him: he is not prejudiced by that, and can have no ground of complaint.

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The case stood over for the consideration of other points not reported here (1).

Cur. adv. vult.

The COURT on this day

Discharged the rule.

DOE D. THE EARL OF EGREMONT v. PULMAN (2).

(3 Q. B. 622—626; S. C. 11 L. J. Q. B. 319; 6 Jur. 1122.)

1842.
June 25.

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In ejectment, to prove that the land in question was part of the estate of the lessor's ancestor, a counterpart of a lease, purporting to demise that land, was produced from the ancestor's muniment room: it was dated in the ancestor's lifetime, and appeared to be executed by the person named

(1) See note (1), p. 328, *ante*. 726 (*affd.* on other grounds, 4 App.

(2) *Magdalen Hospital v. Knotts* Cas. 324).

(1878) 8 Ch. Div. 709, 47 L. J. Ch.

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as lessee, but by no one else. The lease itself was not produced, nor any excuse shown for the non-production. No privy appeared between the lessee and the defendant in the ejectment :

Held, that the counterpart was admissible.

EJECTMENT for lands in Somersetshire. The action was tried before Rolfe, B., at the Somersetshire Spring Assizes, 1840. The lessor of the plaintiff, George, Earl of Egremont, claimed under the will of the late Charles, Earl of Egremont, who died in 1763, leaving the will in question, dated 31st July, 1761. By the will, Earl Charles devised lands, described therein as his manors, lands, &c., late the estate of his father Sir William Wyndham, to his second son for life, with remainder over, &c., and with certain powers of leasing. The defendant held under a lease which, according to the case of the lessor of the plaintiff, was not in conformity with the powers. Sir William Wyndham died in 1741. In order to show that the land in question belonged to Earl Charles, and had been part of the estate of Sir William Wyndham, it was proved that the land had been held by lease from parties who, if the lands had been comprised in the above devise, would have been the parties entitled to let it; but no evidence was given of any actual holding by, or under, Sir William Wyndham, except a deed found in the muniment room containing the documents relating to the property which had belonged to Sir W. Wyndham, and which deed appeared to be a counterpart of a lease, dated in the lifetime of Sir W. Wyndham, purporting to be made by him, and apparently executed by the party therein named as lessee, but by no one else. No *proof of any search for the part executed by the lessor, or of notice to produce it, was offered. The reception of this deed in evidence was objected to; but the learned Judge overruled the objection; and a verdict was found for the plaintiff.

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In Easter Term, 1840, *Bere* obtained a rule for a new trial, on account of the reception of the above evidence (1). In this vacation (2),

Sir W. W. Follett, Solicitor-General, *Erle*, *Crowder* and *Montague Smith*, showed cause :

The evidence was admissible. In *Clarkson v. Woodhouse* (3), counterparts of old leases, from among the muniments of the lord of the manor, were held good evidence in support of his right.

(1) See note (1), p. 328, *ante*.

(3) 53 R. R. 100, n. (5 T. R. 412,

(2) June 22nd. Before Lord Den-
man, Ch. J., Williams and Coleridge, JJ. note (a)).

(COLERIDGE, J.: In that case, as reported in Douglas (1), no distinction is made between counterparts and leases.)

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In *The Duke of Bedford v. Lopes*, Bart. (2), which was an action brought to try the title to the bed of a river, after proof of a grant by Henry VIII., two counterparts of leases were produced from the Duke's muniment room, comprehending the soil in question. No payment by a tenant was proved, nor any modern act of ownership; and the documentary evidence was objected to: but Lord DENMAN, Ch. J., held that, as the instrument came from the muniment room of the Duke, and no circumstance threw suspicion upon it, it was evidence, and the absence of other kinds of proof was mere matter of observation. The counterpart is, in fact, a portion of the *original instrument of demise. The use of it, as evidence, is to show an exercise of ownership over the property in question. To exclude it would, in a great measure shut out all evidence of this kind: for original leases are seldom returned into the lessor's hands when the term expires; and acts of ownership by the landlord, during a long term, are often rare and difficult of proof. This instrument comes within the rule which lets in documents older than the period of living memory, and coming from the proper place of deposit. Pending the lease, it would have been the lord's only evidence of title.

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Kelly, Bere and Butt, contra :

The counterpart was no evidence. "A counterpart, which is not a duplicate original, having been executed by one party only, is admissible against the party who executes it, to prove the execution of the other part which it recites, although no notice has been given to produce the original. But as against a third person, unless he claim in privity, a counterpart cannot be read in evidence without accounting for the want of the original, or proving it to be in the possession of the party, and that he has had notice to produce it": 1 Stark. Ev. 405, 3rd ed. Here the lease itself was not produced, nor its absence accounted for; nor did the plaintiff adduce evidence of enjoyment, or any other subsidiary proof. "The counterpart of a deed, without other circumstances, is not sufficient evidence, unless in case of a fine:" *Anonymous* (3) case in Salkeld: and Lord HARDWICKE says, in *Villiers v. Villiers* (4), that the counterpart

(1) 3 Doug. 189.

(3) 1 Salk. 287.

(2) Tried at Exeter, March, 1838.

(4) 2 Atk. 71.

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may be read, "if an original deed is lost." A counterpart was held *sufficient evidence of the terms of holding in *Roe d. West v. Davis* (1), without notice to produce the original; but there it was relied upon by the lessor against one claiming under the lessee, and was admitted on the principle (recognised also in *The Mayor, &c. of Carlisle v. Blamire* (2)) that the lessee was bound by an instrument which he himself had executed. The point discussed in *Clarkson v. Woodhouse* (3) was independent of any question as to original or counterpart; and the report in Douglas treats the documents as leases. Besides, they were adduced only in support of a custom, and might be evidence of reputation, though, if they had been put forward as showing exercise of ownership, some proof of actual possession or controul might have been necessary. The distinction between evidence of reputation, and evidence of specific facts, is pointed out in *Crease v. Barrett* (4). Here, the documents in question were the only evidence of Sir William Wyndham's seisin. The counterpart of a lease, executed by his lessee, could be nothing more, as between Sir W. Wyndham and a third party, than the admission of a stranger that Sir W. Wyndham was seised. That admission could be no evidence against a third party, unless it came from a person shown to have been in possession; and the counterpart itself could not show that.

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT :

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The question in this case was whether certain evidence *was rightly admitted by my brother ROLFE. The evidence was offered for the purpose of proving that Sir William Wyndham had been seised of certain land. In order to establish this, there was produced, from the muniment room of the property which had descended from Sir William Wyndham, what appeared to be a counterpart of a lease of this land, made by him; but it purported to be executed only by the lessee; and the part executed by Sir William Wyndham was not produced. No proof was given of actual possession under this lease. On this point we thought it right to consult with some of the other learned Judges: and all with whom we have consulted are of opinion that the evidence was admissible. The document

(1) 7 East, 363.

(2) 9 R. R. 491 (8 East, 487).

(3) 5 T. R. 412, note (a); S. C. 3 Doug. 189. (See 53 R. R. 100, n.)

(4) 40 R. R. 779 (1 Cr. M. & R. 919. 930; S. C. 5 Tyr. 458, 472). See *Reg. v. Bliss*, 45 R. R. 757 (7 Ad. & El. 550).

was found where such an instrument would properly be: if Sir William Wyndham was a landlord really granting such a lease, his muniment room was the fit place for keeping the counterpart.

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Rule discharged.

DOE D. GEORGE, EARL OF EGREMONT, AND
EDMONSTONE, v. MARY ANN FORWOOD.

(3 Q. B. 627—640; S. C. 11 L. J. Q. B. 321.)

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Lands were settled, with a power to lease. A., tenant for life under the settlement, made, in May, 1807, a lease which was not a good execution of the power, and received rent in conformity with the terms of the lease, by which the rent was payable on Lady Day, Midsummer, Michaelmas, and Christmas Days. B., a succeeding tenant for life, also received rent in conformity with the terms, and afterwards, in conjunction with C., remainder man in tail expectant upon B.'s estate for life, settled the land to such uses as C. should appoint, and, in default of appointment, to C. for life, remainder to a trustee for C., for C.'s life, remainder to the right heirs of C. C. received rent before B.'s death, according to the terms of the lease; and, after B.'s death, gave notice to the lessee, on 21st March, 1838, to quit "on 29th September next, or at the expiration of the current year of your tenancy." On 19th February, 1839, C. appointed to N. in fee.

Held, that, as between C. and the lessee, the notice was good, and determined the tenancy; and that N., at the expiration of the notice, might evict the lessee; for that, if N. held under the creator of the power, B., no notice to quit was necessary as against N., and if N. held under the appointor, C., he might take advantage of the notice at its expiration.

A lease had been granted, conformably to the power. A later lease (the first above mentioned) was expressed to be granted "for the consideration of the surrender of the present lease, and which is hereby surrendered accordingly," and of a sum of money. The earlier deed of lease was actually given up on the execution of the second. The second lease was not valid, as an execution of the power; but rent was received according to its terms, by successive tenants for life and in remainder under the settlement: Held, that the surrender of the first lease was good (1).

EJECTMENT for lands in Devonshire. The demises were, first, of George Wyndham, Earl of Egremont, dated 1st October, 1838; secondly, of Neil Benjamin Edmonstone, dated 1st November, 1839. On the trial, before Rolfe, B., at the Devonshire Spring Assizes, 1840, a verdict was found for the plaintiff subject to a case, which was stated substantially as follows.

Charles, Earl of Egremont, before and at the date of his will bearing date 31st July, 1761, and from thence to his death, was

(1) Upon this point, which appears to have been assumed rather than actually decided, this case is no longer an authority (see *Doe d. Egremont v. Courtenay* (1848) 11 Q. B. 702, at

pp. 709—711, 17 L. J. Q. B. 151; *Doe d. Biddulph v. Poole* (1848) 11 Q. B. 713, at p. 723, 17 L. J. Q. B. 143; *Noble v. Ward* (1867) L. R. 2 Ex. 135, at p. 138, 36 L. J. Ex. 91.—A. C.

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seised in his demesne as of fee of the premises mentioned in the declaration; and, being so seised, by his will, bearing date as aforesaid, and duly executed, &c., devised all his manors, lands, tenements and hereditaments, and parts and shares of manors, lands, tenements and hereditaments, in the county of Devon, late the estate of his father Sir William Wyndham (of which the premises mentioned in the declaration were part), *to the testator's second son, Percy Charles Wyndham, and his assigns, for life; with remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said Percy Charles Wyndham, respectively, in tail male; remainder to testator's third son, Charles William Wyndham, and his assigns for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said Charles William Wyndham, successively, in tail male; remainder to testator's eldest son, George, Lord Cockermouth, and his assigns, for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said George, Lord Cockermouth, successively, in tail male; remainder to the fourth, fifth and all and every other the son and sons of the said testator's body lawfully begotten, or to be begotten, whether born in his lifetime or after his decease, severally, successively and in remainder, one after another, as they should be in priority of birth, and the respective heirs male of the body of such son and sons lawfully issuing.

The will contained a power to the persons to whom any estate for life was devised, when in actual possession, to make leases; which power was set out in the case.

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The said Charles, Earl of Egremont, died (1) 21st *August, 1763.

(1) The following appear to be the material dates.

21st August, 1763. Death of Charles, Earl of Egremont, the testator. Percy Charles Wyndham entered as tenant for life.

11th July, 1785. Valid lease by Percy Charles Wyndham to Heath. This lease, before the next date, assigned to Weech.

11th May, 1807. Invalid lease by Percy Charles Wyndham to Weech, in consideration of the surrender of the former lease. This lease assigned to the defendant before the next date.

5th August, 1833. Percy Charles Wyndham died, and George O'Brien,

Earl of Egremont, entered as tenant for life.

25th June, 1835. Receipt of rent from defendant by George O'Brien, Earl of Egremont.

24th June, 1836. Lands settled by George O'Brien, Earl of Egremont, and George, Earl of Egremont, the first lessor of the plaintiff, to the appointment of the first lessor of the plaintiff; in default thereof, to the first lessor of the plaintiff, for life, &c.

9th May, 1837. Receipt of rent from defendant by the first lessor of the plaintiff.

14th September, 1837. Receipt of

without having revoked or altered his said will, leaving four sons born in lawful wedlock, viz.: George O'Brien, his eldest son, in the said will called George, Lord Cockermouth, who succeeded his father as Earl of Egremont, the said Percy Charles Wyndham, his second son, the said Charles William Wyndham, his third son, and William Frederick Wyndham, his fourth son, who was born on the 6th April, 1763.

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Charles William Wyndham, the third son, died on the 7th July, 1828, without ever having had issue.

Percy Charles Wyndham, the second son, died on the 5th of August, 1833, without ever having had issue.

William Frederick Wyndham, the fourth son, died on the 18th of February, 1828, leaving the lessor of the plaintiff, the said George, Earl of Egremont, his eldest son, and heir-at-law, him surviving.

The said George O'Brien, Earl of Egremont, died on the 11th day of November, 1837, without ever having had issue.

On the death of the testator, Percy Charles Wyndham entered into the possession and receipt of the rents of the manors, &c., so devised, as tenant for life, under the said will.

Percy Charles Wyndham, being such tenant for life, made and executed an indenture of lease, bearing date 11th July, 1785, between the said Percy Charles Wyndham, of the one part, and Benjamin Heath, of the other part. By this lease, a term of ninety-nine years, if any one of three persons named should so long live, was granted to Benjamin Heath. No objection was to be made by the plaintiff to this lease, as not being in conformity to the power.

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Another indenture was also made and executed by Percy Charles Wyndham, whilst such tenant for life, under his hand and seal, bearing date 11th May, 1807, between the said Percy Charles Wyndham of the one part, and John Weech of the other part. It purported to be granted "for the consideration of the surrender of the present lease granted of the premises hereinafter mentioned for the term of ninety-nine years determinable as is therein mentioned, by an indenture dated on or about the 11th day of July, 1785, and which is hereby surrendered accordingly, and of the sum

rent from defendant by the first lessor of the plaintiff.

11th November, 1837. George O'Brien, Earl of Egremont, died.

21st March, 1838. Notice to quit given to defendant by the first lessor

of the plaintiff.

19th February, 1839. Appointment in favour of Edmonstone, the second lessor of the plaintiff, by the first lessor of the plaintiff.

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of 157*l.* and 10*s.* in hand paid to the lessor by the said lessee " &c. By this lease of 1807, Percy Charles Wyndham demised the land in question to John Weech, his executors, &c., for ninety-nine years. if any one of three persons therein named should so long live. (It was assumed in the argument that these lives were not all extinct.) A rent was reserved payable at Lady Day, Midsummer Day, Michaelmas Day, and Christmas Day.

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John Weech was, at the time of making and executing the last mentioned indenture and counterpart, the assignee of the term and interest of the indenture of the 11th July, 1785; and the said term and interest were vested in him as such assignee: and, on the execution *of such last mentioned indenture, the indenture of the 11th July, 1785, was delivered up by John Weech to Percy Charles Wyndham. Percy Charles Wyndham received the rent reserved by the said indenture of the 11th May, 1807, down to the time of his death. Henry Joseph Thomas Drury, one of the cestui qui vies mentioned in the indenture of 11th July, 1785, is still living: the other cestui qui vies are dead.

Upon the death of Percy Charles Wyndham, George O'Brien, Earl of Egremont, entered into possession and receipt of the rents of the said manors, lands, &c., so devised as aforesaid, as tenant for life under the said will.

By indentures of lease and release, bearing date respectively the 23rd and 24th June, 1836, the release between the said George O'Brien, Earl of Egremont, of the first part, the said George, Earl of Egremont, the lessor of the plaintiff, by his then name of George Wyndham, of the second part, and Charles Murray of the third part, for barring the estate tail of the said George Wyndham, and assuring the inheritance in manner thereafter mentioned, the premises in the declaration mentioned were duly conveyed and assured by the said George O'Brien, Earl of Egremont, and the said lessor of the plaintiff, George, Earl of Egremont, to the said Charles Murray and his heirs, discharged of the life estate of the said George O'Brien, Earl of Egremont, and the said estate tail, and all estates to take effect after the determination of the said estate tail: and it was declared that the said Charles Murray and his heirs should stand seised of the said premises to the use of such person or persons, for such estate or estates, as the said lessor of the plaintiff, George, Earl of Egremont, *then George Wyndham, by deed should appoint; and, in default of appointment, to the use of the said George Wyndham and his assigns for life, remainder to

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the use of the said Charles Murray, during the life of the said George Wyndham, in trust for him; remainder to the use of the right heirs of the said George Wyndham for ever.

By indenture, bearing date 19th February, 1839, and made between the lessor of the plaintiff, George, Earl of Egremont, of the one part, and the lessor of the plaintiff, Neil Benjamin Edmonstone, of the other part, by virtue and in due execution of the power contained in the said indenture of 24th June, 1836, the said George, Earl of Egremont, duly limited and appointed the premises in the declaration mentioned to the use of the said Neil Benjamin Edmonstone, his heirs and assigns, for ever.

The defendant, during the life of Percy Charles Wyndham, became the assignee of the term expressed to be demised in the said indenture of 11th May, 1807: and the following (among other) receipts for rent were given to her. Tyler was the agent of the said George O'Brien, and Tripp of the said lessor of the plaintiff, George, Earl of Egremont, formerly George Wyndham.

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“TIVERTON, 25th June, 1835.

“Received of Mrs. Mary Ann Forwood the sum of one pound one shilling and sixpence, for one year's rent of” &c., “up to Lady Day, 1835.

“1*l.* 1*s.* 6*d.*

“WILLIAM TYLER, Receiver.”

“CULLOMPTON, 9th May, 1837.

“Received of Mrs. Forwood, by Mr. Wright, the sum of one pound one shilling and sixpence, one year's rent *and land tax due to the Earl of Egremont at Lady Day last.

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“1*l.* 1*s.* 6*d.*

“W. U. TRIPP.”

“TIVERTON, 14th September, 1837.

“Received of T. P. Wright, Esq., one pound one shilling and sixpence, being one year's lord's rent due from the trustees of Mrs. Forwood to Captain Wyndham, for,” &c.

“1*l.* 1*s.* 6*d.*

“W. U. TRIPP.”

Since the date of the last-mentioned receipt, no rent has been received for the premises.

On the 21st March, 1838, a notice to quit the premises was given

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by the said lessor of the plaintiff, George, Earl of Egremont, to the defendant. The notice is as follows.

“ Mrs. MARY ANN FORWOOD.

“ I hereby give you notice to quit and deliver up the premises which you now hold of me, situate at,” &c., “ on the 29th day of September next, or at the expiration of the current year of your tenancy.

“ Dated the 19th day of March, 1838.

“ Yours &c.

“ EGREMONT.”

The Court was to be at liberty to draw the same inferences from the facts as a jury might have done, and, at the request of either party, to turn the facts into a special verdict.

The case was argued in last Easter Term (1).

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Montague Smith, for the plaintiff:

The defendant cannot claim under the lease of 1807, for that lease is void, not being a valid execution of the power contained in the will of 1761.

(This was admitted on the part of the defendant.)

Then the defendant will claim as tenant from year to year under the first lessor of the plaintiff and the preceding tenant for life, George O'Brien, Earl of Egremont. But that tenancy is determined by the notice given, on 21st March, 1838, by the first lessor of the plaintiff, which would determine the tenancy in September, 1838, or at Lady Day, 1839, or, at latest, at Midsummer, 1839. On any construction of the notice, the defendant must fail. The appointment to Edmonstone took effect in February, 1839. If the notice to quit expired before the appointment, the tenancy was then determined. If the notice expired after the appointment, then Edmonstone, the second lessor of the plaintiff, may take advantage of it, if his interest derived from the party giving the notice (namely, the first lessor of the plaintiff) takes effect after the notice: but, if, as may be contended on the other side, Edmonstone's interest takes effect, not from the execution of the power to appoint, but from its creation, that is from 1836, then his estate is paramount to any tenancy, from year to year under the first lessor of the plaintiff.

(1) April 26th, 1842. Before Lord Denman, Ch. J., Patteson, Williams and Wightman, JJ.

The tenancies under Percy Charles Wyndham, and under George O'Brien, Earl of Egremont, expired at the respective deaths of these parties: therefore, if Edmonstone's interest takes effect from the creation of the power in 1836, he held the estate discharged of the defendant's interest from 11th November, 1837, the date of the death of George O'Brien, Earl of Egremont.

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But it will be argued that the term of 1785 is still outstanding. The lease of 1807 contains an actual surrender; *and the case finds that the lease of 1785 was delivered up. *Roe d. Earl of Berkeley v. Archbishop of York* (1) will be cited on the other side: but there no express surrender appeared: the subsequent lease there, which was (as here) a bad execution of a power, contained merely a recital of the surrender as part of the consideration: and the attempt was also to show a surrender by way of cancellation. Here the indenture has the words, "which is hereby surrendered accordingly." *Farmer d. Earl v. Rogers* (2) was relied upon there for the plaintiff; and the defendant's counsel distinguished that case on the ground that in it there was an actual surrender in writing by the words, "I do release the said A. B. and discharge the within mortgaged premises from the term of 500 years." The construction admitted by the counsel for the defendant in *Roe d. Earl of Berkeley v. Archbishop of York* (1) is that which the present plaintiff contends for; and the words here are more direct.

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Bere, contra:

It is clear that Edmonstone can neither take advantage of, nor be bound by, the notice of 1838, or any act posterior to the settlement of 1836; for he comes in, under the appointment, as if named in the settlement: *Roach v. Wadham* (3), *Rex v. The Lord of the Manor of Oundle* (4). Then the estate of Edmonstone, dating from 1836, was subject to the then subsisting tenancy from year to year; and nothing has occurred which, as between Edmonstone and the defendant, determines that tenancy. The defendant had an interest which was good by estoppel, or, at any rate, *valid from year to year by the receipt of rent, against the creator of the power and all claiming under him. As to the notice itself: the defendant held from Midsummer, as tenant from year to year to the first lessor of the plaintiff, that day being the first rent day after the date of the

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(1) 8 R. R. 413 (6 East, 86).

(2) 2 Wils. 26.

(3) 53 R. R. 134 (6 East, 289).

(4) 40 R. R. 288 (1 Ad. & El. 283, 291).

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lease, and the terms of the old lease being, in this respect, adopted by the lessor's successor, the first lessor of the plaintiff: *Doe d. Collins v. Weller* (1). The tenancy, therefore, existing on the 21st of March, 1838, could not be determined in the September following; nor could any notice have determined it till Midsummer, 1839. Therefore the first demise is laid too early. But, further, the notice is merely void, since the landlord had no power to put an end to the tenancy either on the 29th of September, 1838, or at the expiration of the current year of the tenancy, which would be Midsummer, 1838.

Next, even if the defendant cannot maintain possession under the terms of the lease of 1807, the title of both of the lessors of the plaintiff is defeated by the lease of 1785, which exists still, unless the surrender recited in the indenture of 1807 determines it. But *Roe d. Earl of Berkeley v. Archbishop of York* (2) shows that a surrender in consideration of a void lease is itself void. An attempt is made to distinguish between express and implied surrenders: but they do not differ in effect, though the proof required is different in the two cases. The principle of *Roe d. Earl of Berkeley v. Archbishop of York* (2) is that, where two transactions take place, one in consideration of the other, if the one be void, the other is so too. There *Wilson v. Sewell* (3) and *Darison v. Bromley v. Stanley* (4) were cited, and recognised. Indeed there is hardly more ground for calling the surrender in the present case express than there was in *Roe d. Earl of Berkeley v. Archbishop of York* (2); and the principle of that case is explained by ABBOTT, Ch. J. in *Hamerton v. Stead* (5), as follows: "the occupation by virtue of the new lease took place under a mistaken idea, that it was a good and valid lease; and when that was discovered to be void, the Court very properly held that it should not operate as a surrender of the former lease." In *Zouch d. Abbot v. Parsons* (6) Lord MANSFIELD says that "no surrender, express or implied, in order to, or in consideration of a new lease, would bind; if the new lease is absolutely void: for, the cause, ground, and condition of the surrender fails."

(PATTESON, J.: The cases are collected in *Doe d. The Bishop of Rochester v. Bridges* (7).)

(1) 4 R. R. 496 (7 T. R. 478).

(2) 8 R. R. 413 (6 East, 86).

(3) 4 Burr. 1975, 1980; S. C. 1 W. Bl. 617, 624.

(4) 4 Burr. 2210.

(5) 27 R. R. 407 (3 B. & C. 478, 481).

(6) 3 Burr. 1794, 1807.

(7) 35 R. R. 483 (1 B. & Ad. 847).

There the new lease was voidable only : and the surrender of the old lease was supported on that ground.

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Montague Smith, in reply :

As to the notice, the lease under which the defendant held must have commenced on 11th November, 1837, the date of George, Earl of Egremont's accession to the estate. In *Doe d. Collins v. Weller* (1) the party giving the notice succeeded immediately to the party granting the lease : here, there was an intermediate tenant for life, who, indeed, must be held to have leased from year to year, but whose death determined the tenancy. But this is not important : because the notice, at any rate, expired *before the date of the second demise : and therefore Edmonstone is entitled to take advantage of it if he takes the reversion under the appointor, the first lessor of the plaintiff : or, if he takes from the creation of the power, he is not bound by the lease at all, and no notice is wanted. It is said that the notice is merely void : but it must be construed reasonably. "Current year" cannot mean current at the date of the lease ; for that would expire before the day previously named in the notice, and (as the argument for the defendant assumes) within three months of the notice. It means the year which will be current on the 29th of September.

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(LORD DENMAN, Ch. J. : In *Doe d. Lord Huntingtower v. Culliford* (2) it was held that a literal construction of a notice could not be adopted, which would make it expire two days after it was given, because that could not have been the intention of the parties. But here the parties did not know that the current year would expire on the next Midsummer.)

The tenant was bound to know the terms on which she held.

(WIGHTMAN, J. : In fact, she is insisting on the tenancy from year to year, which would be determinable, as she says, at Midsummer.)

As to the lease of 1785. The legal consequences of implied and express surrender are certainly the same. But the surrender here is express : and the cases show only that a surrender which is not express cannot be implied from the acceptance of a void lease.

(1) 4 R. R. 496 (7 T. R. 478).

(2) 44 R. R. 878 (4 Dowl. & Ry. 248). See *Doe d. Williams v. Smith*, 44

R. R. 442 (5 Ad. & El. 350) ; *Cadby v. Martinez*, 52 R. R. 487 (11 Ad. & El. 720).

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(LORD DENMAN, Ch. J.: Lord MANSFIELD's remark, which has been cited from *Zouch d. Abbot v. Parsons* (1) goes farther.)

That *was not necessary to the decision of the case. Here the parties do not leave the matter open to a question of intention: they expressly state the surrender.

(PATTESON, J.: The lease is surrendered accordingly, that is, on the supposition of a new lease being granted.

WIGHTMAN, J.: You may perhaps say the new lease is in consideration of the previous surrender; not the surrender in consideration of the lease. But, apparently, it is a single transaction.)

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the Court:

The defendant held, and still holds, under a lease which is admitted to be void; he paid rent to the first lessor of the plaintiff in 1837. In 1836, the then tenant for life, with the first lessor of the plaintiff, settled the estate to such uses as the said lessor of the plaintiff should appoint. In 1839, the first lessor of the plaintiff sold the estate to the second, and executed the power of appointment in his favour. On 19th March, 1838, the first lessor of the plaintiff gave the defendant regular notice to quit, which had expired before the date of the demise.

It is argued, for the defendant, that the second lessor of the plaintiff comes in under the deed of appointment in 1836, not under the appointment made to him in 1839, and, consequently, that the notice of 1838 cannot operate on his tenancy from year to year. This argument proves too much; for there was no tenancy from year to year in 1836, to require a notice to quit from any one but George O'Brien, the late Earl of Egremont. The defendant held at first under a lease binding upon the tenant for life who made it, void indeed against the remainder *men for want of conformity to the leasing power. The next tenant for life in remainder was George O'Brien, the last Earl of Egremont. He recognized the defendant as tenant from year to year; but, on his death, the tenancy of the defendant expired. He became, however, tenant from year to year to the present Earl, who treated him as such by receiving the rent in 1837, and thus bound himself and

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all who may claim under him. But his notice to quit determined that tenancy. If then the second lessor of the plaintiff claim under him, the defendant's right is gone by the notice to quit. If he do not claim under him, but under the deed creating the power of appointment, the defendant had no right against either of these lessors of the plaintiff when that deed was executed. And, as, in this view of the case, the second lessor of the plaintiff's right accrued at that time, the tenancy for life of George O'Brien, the late Earl, being destroyed by that deed, and as the defendant has never been tenant to the second lessor of the plaintiff at all, he had no right to a notice to quit.

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Judgment for plaintiff.

REG. v. THE COMMISSIONERS OF SEWERS FOR THE
TOWER HAMLETS.

1842.
June 25.

(3 Q. B. 670—674; S. C. 11 L. J. Q. B. 231; 3 G. & D. 92; 6 Jur. 1059.)

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The Commissioners of Sewers (under stats. 23 Hen. VIII. c. 5, and 2 W. & M. sess. 2, c. 8) made a rate upon a level formed by uniting two levels, S. and N. which had formerly been distinct. Certain ratepayers of N. objected, on the ground that the level of N. would be rated more highly; and gave the Commissioners notice that they intended to remove the proceedings by *certiorari*. For this purpose, they applied to the Commissioners for an inspection of their proceedings. The Commissioners allowed inspection of all proceedings relating to the union of the levels and to the rate in question, but not of any other documents.

This Court refused to order the Commissioners, by *mandamus*, to produce "all commissions, plans, rates, presentments, decrees, accounts, books, proceedings and minutes of proceedings, relating to the district" comprising the two levels, for inspection by the said ratepayers. Though the Commissioners had given the ratepayers notice of their intention to enforce the rate.

ERLE, in last Hilary Term, obtained a rule calling upon the above-named Commissioners to show cause why a *mandamus* should not issue, commanding them to produce all commissions, plans, rates, presentments, decrees, accounts, books, proceedings and minutes of proceedings, relating to the district of the Tower Hamlets, or any parts thereof, for inspection by the solicitors of the St. Katherine Dock Company. The facts shown on affidavit, so far as material to the decision of the Court, were as follows.

The Commissioners act under stats. 23 Hen. VIII. c. 5, and 2 W. & M. sess. 2, c. 8. Before 1836 the district was divided into several levels, for each of which separate and distinct presentments were made, and separate and distinct accounts kept. One of them

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was the Spital Fields and Wapping Level (1), and another the Nightingale Lane Level. In 1836 the Commissioners, by order, directed works, which were executed accordingly, uniting the two into one drainage. In 1838, a jury presented *the owners and occupiers of "The Spital Fields, Wapping and Nightingale Lane Level." This presentment not having been traversed, the Commissioners, on 20th July, 1838, decreed a rate of 9*d.* in the pound upon the level so presented. The St. Katherine Dock Company (2) possessed large property within the level of Nightingale Lane. They conceived themselves to be aggrieved by the joint rate, and the order uniting the levels, as subjecting them to a higher rate than that to which they were liable before the union : they therefore gave notice to the Commissioners of their intention to bring the proceedings of the Commissioners before this Court by *certiorari* ; and, as a preparatory step, applied by letter to the Commissioners for "copies of some of the proceedings of the Commissioners," for the purpose, as stated in the application, of preparing affidavits for the *certiorari*. The Commissioners granted an inspection of all proceedings and documents relating to the union of the levels, and to the rate in question ; and the solicitor for the Company inspected such proceedings accordingly, taking copies of what he considered material. The Commissioners, however, refused to permit the inspection of any other documents : and they informed the Company of their intention to enforce the rate.

In last Term (3),

Sir W. W. Follett, Solicitor-General, *Kelly* and *Willes* showed cause :

[*672] This inspection cannot be granted. The applicants have no interest in any documents besides *those which they have already inspected : and, further, there are no legal proceedings as yet instituted in the matter. It certainly was held, in *Rex v. The Justices of Leicester* (4), that the ratepayers to a borough rate in the nature of a county rate were entitled to inspection of copies of the last two rates, and all orders made for the expenditure of the same, and the orders of Sessions made thereon, and other

(1) This level was itself made up of two, the Spital Fields Level, and the Wapping Level, which the Commissioners had united.

(2) Established by stat. 6 Geo. IV. c. cv. (local and personal, public), and

later Acts.

(3) June 13th, 1842. Before Lord Denman, Ch. J., Patteson, Williams, and Coleridge, JJ.

(4) 4 B. & C. 891.

proceedings and documents relating thereto. But the present application is unlimited, both as to time and as to the nature of the accounts. And *Rex v. The Justices of Leicester* (1) was questioned in *Rex v. The Vestrymen of St. Mary-le-Bone* (2), and expressly overruled in *Rex v. The Justices of Staffordshire* (3), on the ground of the want of interest in the ratepayers. In *Rex v. Allgood* (4) this Court refused to compel the lord of a manor to allow an inspection of the Court rolls to a freehold tenant, who did not show that he had "some cause depending." In *Rex v. The Mayor of Maidstone* (5) a *mandamus* to allow inspection of the records of a Court leet was refused to a party who assigned no reason for the inspection except a supposed general right.

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Erle, Platt and Ogle, contrà :

The applicants state their object, which is, to try the question whether the union of those levels is not contrary to the principle of *Rex v. Commissioners of Sewers for the Tower Hamlets* (6). They have a direct interest in the question. It is true that no motion has yet been made for a *certiorari* : but the object is to obtain the necessary materials for such a *motion, which indeed cannot be rightly made without such materials. That intention is, in principle, as sufficient a reason for inspection as an actual cause depending. It is necessary to know the previous divisions and other circumstances of the levels, that the parties may be properly brought before the Court (7). Here a distress is actually threatened. In *Rex v. Tower* (8) a *mandamus* went to compel the lord of a manor to allow inspection of the Court rolls, so far as regarded the cutting of underwood, to a tenant who claimed the right to cut, which the lord denied : and the argument, that no suit was depending, was there unsuccessfully urged.

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Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the Court :

This was an application, by the St. Katherine Dock Company, for

(1) 4 B. & C. 891.

(2) 5 Ad. & El. 268, 275.

(3) 45 R. R. 412 (6 Ad. & El. 84).

(4) 4 R. R. 574 (7 T. R. 746).

(5) 6 Dowl. & Ry. 334.

(6) 33 R. R. 249 (9 B. & C. 517).

(7) The counsel in support of the rule referred to a case of *Birkett v. Crozier*, in which this Court, in Trinity

Term, 1827, ordered such an inspection as that now applied for. The counsel opposing the rule stated that the order appeared to have been made by consent. The cause was afterwards tried, December 11th, 1827: *Birkett v. Crozier*, Moo. & Mal. 119.

(8) 16 R. R. 428 (4 M. & S. 162).

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a *mandamus* to compel the inspection of the rate books and other books of the Commissioners of Sewers. It seems that the Commissioners have made some alteration in the mode of rating the different levels within their jurisdiction; by which it is alleged that the applicants are improperly united with a very expensive district, and burthened with a much heavier rate than they ought to be: and they are desirous of inspecting the books, in order to ascertain whether it has been the practice of the Commissioners to make such alterations in former times.

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The law on the subject of rating different levels is laid down in *Rex v. Commissioners of Sewers for the Tower Hamlets* (1): but it is said that the present dispute may be materially affected by the practice which has prevailed. Now this is not a question of custom, nor one which depends upon the continued exercise of any right claimed: nor is it made at all clear to us how the inhabitants of the parish in which the St. Katherine Docks are situated can be affected by alterations made as to other parishes, or how they are interested in any proceedings which have been adopted by the Commissioners in regard to any other places, and to which they have not been parties.

As to all entries of rates and other matters relating to their parish, they may have the right of inspection: but to that extent we understand that it has been given to them. And none of the cases on this subject warrant us in compelling the inspection of any other documents.

Rule discharged (2).

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 Nov. 2.

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DOE D. FRYER *v.* COOMBS.

(3 Q. B. 687—690; S. C. 12 L. J. Q. B. 36; 3 G. & D. 193; 6 Jur. 930.)

The *onus* of showing that a deed, otherwise regular, has not been duly stamped lies on the party impeaching it. And, if a deed be produced, purporting to have been sealed and delivered, "being first duly stamped," but the stamp has been obliterated, and it only appears by marks on the deed that some stamp was once impressed on it, the Judge may decide whether or not the fact of stamping is sufficiently proved, and, if satisfied of it, receive the instrument as evidence.

EJECTMENT by reversioner against lessee for lives. On the trial, before Wightman, J., at the last Dorchester Assizes, the lessor of

(1) 33 R. R. 249 (9 B. & C. 517).

(2) See *Rex v. The Merchant Tailors' Company*, 36 R. R. 503 (2 B. & Ad. 115); *Burrell v. Nicholson*, 3 B. & Ad.

649; *Birmingham, Bristol, and Thames Junction Railway Company v. White*, 1 Q. B. 282.

the plaintiff (who relied upon a forfeiture) produced, in proof of his title, deeds of lease and release executed in 1806. The deed of release had no *ad valorem* stamp, but appeared, by marks remaining upon it, to have been stamped. The stamp itself was obliterated. No evidence was given to account for the state of the deed. It was thereupon *contended by the defendant's counsel that the deed was inadmissible. WIGHTMAN, J. received the evidence; and the plaintiff had a verdict.

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Erle now moved for a new trial :

The instrument had no stamp, and therefore, according to the express language of the Stamp Act (1), could not be used as evidence. It was impossible, on looking at this deed, to say that it was, or had been, stamped as the Act requires.

(WIGHTMAN, J. : I think there was enough left on the parchment to show that there had been a stamp.

LORD DENMAN, Ch. J. : Was not it for the Judge to say whether, in his opinion, the instrument had been stamped. *Primâ facie* it will be supposed that the deed was executed by parties who knew what they were about.

WIGHTMAN, J. : I think the attestation clause had the words "being first duly stamped."

LORD DENMAN, Ch. J. : A person might destroy the stamp after it had been properly imposed.)

If evidence like this were receivable, an improper stamp might be made available by obliterating it.

(COLERIDGE, J. : Suppose the seal of an old deed is rubbed off by accident.)

Formerly that would have been held to avoid the deed, Com. Dig. Fait (F. 2), though the same doctrine would not prevail now (2). But the party setting up a deed which is said to have become imperfect by accident should at least give some evidence to account for its condition. The *onus* of proof here did not rest on the defendant.

(1) See stat. 37 Geo. III. c. 19, s. 3. *Davidson v. Cooper* (second argument),

(2) See Shepp. Touch. 69, and Mr. 11 M. & W. 778, 788 *et seq.*

Preston's comment. (7th ed.). Also

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LORD DENMAN, Ch. J. :

The *onus* lies upon the party attacking a deed which appears to have been properly *executed. The Stamp Acts superadd the necessity of something beyond execution ; but the party impeaching the deed ought to show the want of that requisite. And, if the appearance of the deed, combined with the probability that parties would take care of their own interest, gave reason to infer that a stamp had been affixed, the Judge was entitled to say that the instrument had been properly completed, and to receive it in evidence.

WILLIAMS, J. concurred.

COLERIDGE, J. :

The only question here raised is, whether the deed was admissible in evidence ; and there was abundant ground for holding it to be so.

WIGHTMAN, J. concurred.

Rule refused.

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Nov. 4.
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CHARLETON AND WATSON v. SPENCER.

(3 Q. B. 693—698 ; S. C. 12 L. J. Q. B. 23 ; 6 Jur. 1013.)

An agreement of reference recited that C. claimed a balance of 201*l.* to be due to him from S. ; and it was covenanted, between C. and S., that all disputes and differences which existed between them should be referred to the arbitration of B., to determine the account between the parties, and the true balance.

Held, that C. was entitled to the decision of the arbitrator upon all matters in dispute up to the time of the agreement, though independent of, and arising subsequently to, the matters upon which the balance of 201*l.* was claimed.

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COVENANT. The declaration stated that heretofore, to wit 14th March, 1842, by articles of agreement between plaintiffs on the one side and defendant on the other, sealed &c. (*profert*), dated &c., *' after reciting that the plaintiffs claimed a balance of 201*l.* 9*s.* 10*d.* to be due to them from the defendant, and that they, the plaintiffs, also claimed interest on the said balance from the time of the respective payments, it was witnessed that it was thereby covenanted and agreed by and between the said parties thereto, to wit the plaintiffs and the defendant, that all disputes and differences which existed between the said parties respectively should be referred to the arbitration of one George Bates, of " &c., " to determine the account between the said parties, and the true balance, and to

appoint how and in what proportions such balance should be paid, and by and to whom; and that the award of the said G. Bates, made in writing, &c., ready to be delivered &c., on or before &c., should be binding and conclusive on all the said parties, and their heirs, executors and administrators." (Then followed provisions for making the reference or submission a rule of Court, and other terms not material to the point afterwards discussed.) "As by the said articles" &c. That Bates made and published his award in writing, &c., and did thereby award and determine that the true balance justly due and owing from the defendant to the plaintiffs was the sum of 190*l.* 8*s.* 2*d.*: and he did thereby award and appoint that the defendant, his executors or administrators, should pay the said sum of 190*l.* 8*s.* 2*d.* to the plaintiffs, their executors or administrators, on &c. (Further award as to arbitrator's costs and costs of the reference, which were to be borne by the defendant.) Of which award defendant, to wit on &c., had notice. Averments as to amount of costs. Breach, non-payment of the 190*l.* 8*s.* 2*d.* balance, and 11*l.* 2*s.* 6*d.*, and 23*l.* 11*s.* 10*d.*, costs.

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Pleas: 1. That the said articles of agreement were not the deed of plaintiff in manner &c. Issue thereon. 2. That Bates did not make the award in manner &c. Issue thereon. 3. That, after the making of the said articles of agreement, and before the making of the said award, to wit on &c., plaintiffs claimed of defendant the payment of, and alleged that he was liable to pay them, a certain debt or sum of money amounting (to wit) to 120*l.*, for and in respect of the plaintiffs having before them taken up and paid a certain bill of exchange, dated 17th January, 1840, drawn by A. L. upon, and accepted by, plaintiffs, for the payment of 120*l.* to R. W. & Co. two months after the date thereof. That the said claim of plaintiffs was another and different claim to the said claims, or either of them, in the articles of agreement mentioned, and did not constitute or form any part thereof, or of the account in the said articles mentioned; and that no dispute or difference in respect of the same, or any part thereof, existed between plaintiffs and defendant at the time of the making of the said articles; and the said claim, or defendant's liability to pay plaintiffs the said debt or sum of 120*l.*, was not, nor was any part thereof, by the said articles referred to the arbitration of Bates. That the said award was made by Bates as aforesaid of and concerning other matters, disputes and differences than such as were by the said articles of agreement referred to him as aforesaid,

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and of and concerning a dispute and difference between plaintiffs and defendant which did not exist at the time of the making of the said articles of agreement, to wit of and concerning the said claim so made by the plaintiffs of defendant in respect of the *said debt or sum of 120*l.*, and of and concerning defendant's liability to pay the plaintiffs the same. That Bates, in awarding and determining that the balance due from defendant to plaintiffs was the sum of 190*l.* 8*s.* 2*d.*, without the consent and against the will of defendant, awarded and determined of and concerning the said claim, and as to defendant's liability to pay the said debt or sum of 120*l.* to plaintiffs; and that the said award was and is void in law. Verification.

Replication. That the claim of plaintiffs to the said debt in respect of plaintiffs having taken up and paid the said bill of exchange in the last plea mentioned did constitute and form part of the said claims in the said articles of agreement mentioned, and of the said account in the said articles mentioned; and the said claim, and the defendant's liability to pay the plaintiffs the said debt, was by the said articles referred to the arbitration of Bates. Conclusion to the country. Issue thereon.

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On the trial, before Lord Abinger, C. B., at the last Surrey Assizes, it appeared, according to the view contended for by the defendant's counsel, that the defendant had been a member of a partnership carrying on a colliery in Northumberland: that the partnership was in the habit of consigning cargoes of coal to the plaintiffs, who were coal factors in London, and drawing bills against the consignments: that, early in 1840, the defendant ceased to be a member of the partnership: that the alleged balance of 201*l.* 9*s.* 10*d.*, recited in the agreement of reference, and claimed against him by the plaintiffs, arose upon bills drawn by the partnership before the defendant quitted it: that this was reduced, at the arbitration, by a set-off allowed by *the plaintiffs in respect of cargoes consigned to them before the dissolution of the partnership to 123*l.* 18*s.* 9*d.*: and that the sum of 47*l.* 10*s.* 10*d.*, which, with interest on the sums, made up the 190*l.* 8*s.* 2*d.* named in the award, arose (after some deductions) upon a bill for 120*l.*, drawn in favour of the partnership, after defendant had quitted it, upon, and accepted and paid by, the plaintiffs, on an account independent of the balance of 201*l.* 9*s.* 10*d.*, and for which the members remaining in the partnership after the defendant had quitted it were alone liable. The LORD CHIEF BARON decided that

the parties were bound by the operative part of the agreement of reference: and, it appearing that this bill had become due, and been taken up before the making of the agreement, and that a claim in respect of it was made before the arbitrator, his Lordship directed a verdict for the whole sum awarded. Leave was given to move to enter a verdict for the defendant on the third issue.

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Thesiger now (1) moved to enter such verdict for the defendant, or for a new trial :

The defendant was entitled to show that the bill for 120*l.* made no part of the subject-matter of reference. The account between the parties, and the true balance, are, indeed referred generally: but, by the recital, it appears that such account and balance relate merely to the 201*l.* 9*s.* 10*d.* When, therefore, it was shown that the bill was not comprehended in claim for the 201*l.* 9*s.* 10*d.*, it followed that such bill formed no part of the matters referred. The operative words of deeds are frequently controlled by the intention *of the parties as appearing from the recital. *Upton v. Upton* (2), *Payler v. Homersham* (3), *Simons v. Johnson* (4), are instances.

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Cur. adv. vult.

LORD DENMAN, Ch. J., afterwards, in this Term (November 11th), delivered the judgment of the COURT :

In this case, the LORD CHIEF BARON ruled that the parties to the agreement of reference were bound by the terms of the agreement, which submitted to the arbitrator, in effect, the account between the parties, and the true balance, and all matters in dispute, as they existed at the time of making the agreement. It was contended that this was controlled by the recital, which states that the plaintiffs claimed a balance of 201*l.* 9*s.* 10*d.*: and it was sought, on the authority of *Payler v. Homersham* (3), to limit the arbitrator's power to the matters included in the balance so claimed. But we think that the agreement, though it recites the fact of such a claim having been made, afterwards refers every matter existing up to the date of the agreement. The recital merely indicates the motive of the submission; it does not limit

(1) Before Lord Denman, Ch. J.,
Williams, Coleridge, and Wightman,
JJ.

(2) 36 R. R. 817 (1 Dowl. P. C. 400).

(3) 16 R. R. 516 (4 M. & S. 423).

(4) 37 R. R. 377 (3 B. & Ad. 175).

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the arbitrator's power: and there is nothing unreasonable in referring claims other than that which formed the original inducement to refer.

Rule refused.

1842.
Nov. 5.
[699]

RUSHWORTH v. TAYLOR.

(3 Q. B. 699—701; S. C. 12 L. J. Q. B. 80; 3 G. & D. 3; 6 Jur. 495.)

Bailee of a gun overcharged and burst it. The owner required him forthwith to deliver it back in the same good plight in which he received it. Bailee refused to do the repair, and, the gun not having been returned, the owner brought trover:

Held, that the refusal to comply with a demand of redelivery, qualified as above, was not of itself evidence of a conversion.

TROVER for a gun. Plea, Not guilty. There were also a special count in case, and pleadings on it, which it is unnecessary to notice further. On the trial, before Lord Denman, Ch. J., at the last Summer Assizes at York, it appeared that the plaintiff, in July or August, 1839, put the gun into the possession of one Cross, to be sold. Cross, with the view of obtaining a purchaser, lent it to one Todd; and Todd lent it to the defendant to try. Defendant overcharged the gun, and burst it. Plaintiff afterwards wrote to defendant as follows:

“Mr. GEORGE TAYLOR,

“I hereby give you notice that the double-barrelled gun you received from Robert Todd, which he received from Thomas Cross, who had previously received the same from me for the purpose of making sale thereof, is my property; and I hereby demand the same of you, and require you forthwith to deliver the same to me in the same good plight and condition as the said gun was in at the time you received the same from the hands of the said Robert Todd. Dated this 11th day of March, 1840.

“JOHN RUSHWORTH.”

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Defendant said that he would not pay for the repair of the gun. He afterwards redelivered it to Todd, for the purpose, as was said, of his taking it to a gunmaker's; and it was then taken (but by whom did not distinctly *appear) to a gunsmith at Hull, and remained in the possession of the gunsmith or of the defendant, never having been restored to the plaintiff, when this action was brought. The LORD CHIEF JUSTICE thought it difficult to say that the qualified demand contained in the letter (that the gun should be delivered up “in the same good plight,” &c.), and the refusal

which followed, were, of themselves, proof of a conversion; and he directed the jury to find for the defendant on the first count, if, in their opinion, there had been no denial of the plaintiff's right. Verdict for defendant on all the issues. RUSHWORTH
TAYLOR.

W. H. Watson now moved for a new trial on the ground of misdirection, and contended that the demand and refusal, if not of themselves evidence of a conversion, fully proved it when coupled with the other facts of the case, to which the jury's attention had not been sufficiently directed in the summing up.

(LORD DENMAN, Ch. J.: The claim in trover was founded on a demand and refusal: and the demand was that the gun should be delivered in the same good plight as when the defendant received it. Refusal of such a demand is different from refusing altogether to restore.)

WILLIAMS, J.:

The case was properly put to the jury as to the demand and refusal. A demand of the article *in statu quo* was not a demand on which, in case of refusal, a charge of conversion could be founded. The rest of the evidence did not bear out the declaration.

COLERIDGE, J.:

I am of the same opinion. The qualified demand could not be complied with: and the *rest of the evidence was not clear enough to entitle the plaintiff to recover. [*701]

Lord DENMAN, Ch. J. and WIGHTMAN, J. concurred.

Rule refused.

HARTLEY v. MOXHAM.

(3 Q. B. 701—702; S. C. 12 L. J. Q. B. 41; 3 G. & D. 1; 6 Jur. 946.)

1842.

Nov. 7.

Defendant, claiming a sum of money as due to him from plaintiff, his lodger, locked up plaintiff's goods in a room which he held of defendant, and in which plaintiff had put them, kept the key, and refused plaintiff access to them, saying that nothing should be removed till defendant's bill was paid:

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Held, not such a taking of the goods as would sustain an action of trespass.

TRESPASS for seizing, taking, carrying away and converting articles of furriery, and other goods and chattels of the plaintiff. Pleas, Not guilty, and a justification (on which nothing ultimately turned), alleging that defendant, as an innkeeper, detained the

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goods as a pledge for money due in respect of lodging, &c. On the trial, before Cresswell, J., at the last Summer Assizes for Somersetshire, the following facts appeared. The plaintiff had lodged in the house of the defendant, who was a poulterer, and kept a beer shop at Clevedon. In September, 1841, plaintiff was packing up some goods for the purpose of taking them to Gloucester for sale, when defendant said that nothing should be removed till plaintiff had paid defendant his bill. A dispute arose; and the bill was not paid. Plaintiff put the goods under the charge of his own servant, in his bedroom: and defendant then locked them up in that room, kept the key, and detained the goods till plaintiff was prevented from going his intended journey. It was objected that trespass would not lie, inasmuch as no act of taking appeared, but, at most, only a wrongful detention, the defendant never having touched the goods; and CRESSWELL, J., being of opinion that no taking was proved which would support an action of trespass, directed a nonsuit.

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Erle now moved for a new trial:

If the goods were not, in a literal sense, taken away, they were separated from the owner by locking the door upon them. A constructive taking was recognised in *Swann v. The Earl of Falmouth* (1), where the circumstances were not so strong in favour of the plaintiff as here.

(LORD DENMAN, Ch. J.: The defendant's own declaration there concluded him; and it was not held that trespass would lie.)

In *Etherton v. Popplewell* (2), where the plaintiff succeeded in an action of trespass, the goods were not removed, but only locked up. In *Blades v. Arundale* (3) the sheriff was considered to have seized goods, though the officer merely laid his hand on a table, saying "I take this table," locked up the warrant in the table drawer, took the key, and went away, without leaving any person in possession. The defendant here had acquired such a possession of the goods that he might have maintained trespass against a third person for taking them away.

LORD DENMAN, Ch. J. :

There is no ground for this motion. Cases like the present must

(1) 32 R. R. 441 (8 B. & C. 456).

(3) 14 R. R. 555 (1 M. & S. 711).

(2) 6 B. R. 235 (1 East, 139).

often have occurred; yet there is no authority for an action of trespass under the circumstances. The case differs from that of a distress, where the landlord asserts that he takes the goods, and thereby acquires an authority and power of control over them. And, even in such a case of taking, it has never been held that trespass would lie if the act was wrongful.

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WILLIAMS, COLERIDGE, and WIGHTMAN, JJ. concurred.

Rule refused.

EDWARD WALTON CHAPMAN *v.* BECKINTON.

1842.

(3 Q. B. 703—722; 12 L. J. Q. B. 61; 3 G. & D. 33; 7 Jur. 62.)

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A bond of guarantee, reciting that W. and E. and P. had entered into copartnership in a certain business, and had, on the treaty for such copartnership, agreed that P. should be the acting partner in the said business, stated, as the condition, that P. should keep all the covenants in a certain indenture of copartnership between him and W. and E., and also should, during such time as he should continue the acting partner in the said business of the said copartnership, truly account for all monies which should come to his hands as such partner as aforesaid to the said W. and E.

By the indenture referred to, after reciting that W. and E. had carried on the trade or business &c., and had agreed to admit P. a partner therein, W., E. and P. covenanted to each other to become partners in the trade or business &c. from the day of the date of that deed of copartnership, for a term of years: P. to superintend the business, perform the duties of an acting partner during the said copartnership, and have the care and custody of the account books during the continuance of that copartnership: that W., E. and P. should meet yearly during that copartnership, cast up the accounts, and value the stock &c. Proviso, that, if any of the parties, their executors, &c., should desire to withdraw from that copartnership at the end of the seventh year, and should give notice &c., that indenture of copartnership should, on the expiration of such notice, determine as to such party. Agreement, that any one of the partners in the said joint trade might transfer his share therein during his lifetime to his son, being of age, or might bequeath the same to any person by will, and that such son or other person, &c., or, in case of the death of any partner without having made such transfer or disposition, the executors or administrators of such partner, should be deemed a partner or partners in the said joint concern during the then residue thereof in respect of such share &c., in the place of such partner &c., and should hold such share during the remainder of the said copartnership, subject to the provisions of that indenture.

After the making of the bond and indenture, W. died; and, after his death, P., as managing partner, rendered false accounts; whereupon E. declared against P.'s surety in debt upon the bond. Plea, performance of the condition. Replication, after setting forth the indenture, that P., while he continued such partner in the trade and business of the said copartnership as aforesaid, and after the decease of W., did not duly

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account, &c., but delivered false accounts. Rejoinder, that P. did not deliver false accounts in manner &c. Issue thereon. Verdict for plaintiff.

Held, on the construction of the above deeds, that the copartnership referred to in the condition of the bond was determined by W.'s death, and the surety, therefore, was not liable for P.'s default happening after that event.

That the defendant, however, having accepted an issue on the above rejoinder, could not claim a nonsuit.

But, although the Court, on motion for a nonsuit, and rule *nisi* granted, discharged the rule, they arrested the judgment.

DEBT on defendant's bond, made January 2nd, 1830, to plaintiff and William Chapman since deceased.

Plea. Condition set out on *oyer*, as follows. "Whereas the said William Chapman, Edward Walton Chapman and Washington Potts have lately entered into copartnership in the trade or business of ropemakers, to be carried on by them at Willington Ropery in the county of Northumberland, and, upon the treaty for the said copartnership, *it was amongst various other things agreed that the said W. Potts should be the acting partner in the said trade and business, and that, in consideration of the trust and confidence thereby reposed in him by the said W. Chapman and E. W. Chapman, he the above bounden W. Potts, and also the above bounden John Beckinton" (defendant), "as his surety, should, by writing obligatory under their respective hands and seals, become jointly and severally bound under the said W. C. and E. W. C. in the sum of 1,000*l.*, subject to such condition for making void the same bond as hereinafter is mentioned; and, in pursuance of such agreement, the said W. Potts and the said J. Beckinton have executed the above written bond: Now the condition of the above written obligation is such, that, if the said W. Potts shall well and truly observe, perform and keep all and every the covenants, provisoes, clauses and agreements on his part to be observed and performed, contained in a certain indenture or deed of copartnership bearing date the 1st day of January instant, and made between the said W. C. of the first part, and the said E. W. C. of the second part, and the said W. Potts of the third part; and also, if he the said W. Potts, during such time as he shall continue the acting partner in the said trade or business of the said copartnership, shall and do well and truly and faithfully make, deliver or transmit a just and true account in writing of all sum and sums of money, cash, notes, bills and other partnership effects, which shall come to the hands of the said W. Potts, or which he shall be entrusted with, by or on account of the said copartnership, and also make good answer for and pay the monies due on the balance of such account, and *also

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of all and every other sum and sums of money, cash, notes and bills, which may by possibility come to the hands of the said W. Potts as such partner as aforesaid, to the said W. C. and E. W. C. : and if the above bounden " &c. (further condition, if W. Potts and defendant should indemnify &c. the said W. Chapman and E. W. Chapman, their executors, &c., from and against all losses &c., for or by reason of any act &c. to be done or committed by him the said W. Potts as such acting partner as aforesaid, or in any manner relating thereto) ; then this obligation to be void &c., otherwise &c. Averment that the said W. Potts hath always since the making of the said writing obligatory until the time of the commencement of this suit well and truly observed, performed and kept all and every the covenants, &c. on his part &c. (following the words of the condition), and hath always, during all the time he continued to be the acting partner in the said trade &c., well and truly &c. (averment of W. Potts having accounted &c., in the words of the condition), and also during all the time aforesaid made good answer for, and paid, the monies due &c., and also all and every other sum &c. which during the time aforesaid came to the hands of the said W. Potts, as such partner as aforesaid, to the said W. Chapman, and E. W. Chapman in the lifetime of the said W. Chapman, and to the plaintiff since the decease of the said W. C. ; and that W. Potts and defendant have always, since the making &c., well and sufficiently saved, &c. and indemnified the said W. Chapman and plaintiff in the lifetime of W. C., and plaintiff since W. C.'s decease, from and against all losses &c., for or by reason of any act &c. (as above). Verification.

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The replication set forth the indenture, whereby, after reciting that the said W. Chapman and plaintiff had for some years then last past, and up to the day of the date thereof, carried on the trade or business of ropemakers at Willington, in and upon certain premises demised to and owned by them as was therein stated, and were owners of certain machinery &c. there erected and being ; and reciting also that it had been agreed between the parties to that indenture that the said W. Potts should be admitted a partner with the said W. Chapman, deceased, and plaintiff in the said trade or business, from the day of the date thereof during the time, upon the terms and conditions, and subject to the several provisions, stipulations &c., thereafter contained ; in pursuance of the said agreement, and in consideration of a certain capital advanced and brought into the joint trade by W. Potts, and of the special trust

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&c. of the parties in each other, the said W. Chapman, deceased, plaintiff and W. Potts did, in and by the said indenture, jointly and severally covenant, promise and agree to and with each other that they, the said parties thereto, should and would, at and from the day of the date of the said indenture or deed of copartnership, and up to the 1st day of July which would be A.D. 1841, be and become partners and joint traders in the art, trade or business of patent and common ropemakers, under the firm of Chapmans and Potts: the premises, machinery, stock, profits &c., to be, during the copartnership, considered as partnership property, and to belong to the said parties, their executors &c., in the shares and proportions of one third part to each; proviso, that, "at the end or other *sooner determination of the said copartnership," W. Chapman and plaintiff (and one John Anderson) should be exclusively entitled to certain machinery which was scheduled; also for an allowance to W. C. and plaintiff for the use of a half part of the machinery in which they had a distinct interest: agreement that the trade &c. should be carried on in the joint names &c., and for the joint benefit of the said partners: and that W. Potts should attend and reside at the ropery, and have the general superintendence of the said trade or business during the said copartnership: covenant by W. Potts to and with W. Chapman and the plaintiff, their executors, &c., that he would, during all the term of that copartnership, devote the whole of his time, skill and most assiduous attention and diligence, with such assistance of the plaintiff as should be deemed necessary by the said parties thereto, in and towards the affairs and business of the said ropery, and in the improvement and management and extension thereof, to the best advantage of all the said parties thereto, and should not absent himself therefrom nor neglect the same, but that he would in every respect faithfully and diligently perform the duties incumbent upon an acting partner. Agreement, that W. Chapman and plaintiff should not be under obligation to attend to the business, but that plaintiff should be allowed certain annual compensation if he did so: that certain annual compensation should be allowed to W. Potts for his trouble in the superintendence: that W. Potts should, during the continuance of that copartnership, have the care and custody of all the books of account relating to the joint stock and trade, they, the said *W. Chapman deceased and plaintiff having access thereto at all times whenever they should think fit; and that W. Potts, his executors &c., should make good to the joint stock all

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money wasted or lost during the time in which he should have the care and custody or receiving thereof as aforesaid (with certain exceptions). Agreements for the defraying of certain expenses, and providing for losses &c. out of the joint stock, and according to the respective shares ; for continuing the capital and profits in the joint trade during the said copartnership &c. ; and for regulating the management of the concern, and conduct of the partners, in other respects ; and, further, that the said parties should meet at the said ropery on 1st March, 1831, and so in future yearly and every year during that copartnership, and make, cast up and fairly state between and amongst them a true and perfect account in writing, touching and concerning the said joint stock, and all monies, debts and effects thereon due and owing to or from the said copartnership, and of and concerning all matters relating thereto, &c., and should thereupon enter the true particulars of every such yearly account, and the rest or balance thereof, in three several books to be provided as aforesaid ; and, on allowance of the account, should subscribe the books, and each party should take one of the books into his own custody, and the account should be conclusive, except in certain specified cases ; and that the net profits should be divided &c. Provided always that, in case any of the parties, their executors, &c., should be desirous to withdraw from that copartnership at the end of the seventh year of the said copartnership, and should give to the others of the said partners twelve calendar months' previous notice &c., *then that present indenture of copartnership, and every covenant &c. therein contained, should on the day of the expiration of such notice, cease, determine and be absolutely void as to the party or parties so giving the same, except so far as regarded the valuation of the share of such party or parties, which valuation, and payment of the value, were then provided for. And it was further declared and agreed that any of the partners in the said joint trade should be at liberty to transfer, in his or their lifetime, his or their respective shares therein, or any part or parts thereof, to any one or more of their respective sons, being of the age of twenty-one years or upwards, and not to any other persons, except under the regulation thereafter mentioned (1) and contained in that behalf ; and also to dispose of and bequeath his or their respective shares, or any part or parts thereof, by will, to any person or persons whomsoever ; and that the son or sons, or other person or persons, to whom any such transfer or

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(1) No provision on this subject appeared in the replication.

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disposition should be made as aforesaid, or, in case of the death of any partner without having made any such transfer or disposition as aforesaid, then that the executors or administrators of every such partner so dying, should be deemed and considered as a partner or partners in the said joint concern during the then residue thereof, in respect of such share or shares, or any part or parts of a share or shares, so transferred or bequeathed, or which should become vested in them respectively as executors or administrators of any such deceased partner or partners as aforesaid, in the stead and place of the partner or partners from whom they should respectively *have derived such share or shares, or part or parts of a share or shares, of and in the said joint trade or business, and should hold such share or shares, or part or parts of a share or shares, for all the then residue and remainder of the said copartnership, subject to and under the several stipulations, provisoes, conditions and agreements contained in those presents. And, lastly, it was covenanted, declared and agreed that, if any difference should arise between the parties, or either of them, or the survivors and the executors, &c., of a deceased partner, touching the said joint trade &c., or any other matter or thing concerning the said copartnership, or any thing in those presents contained, all such differences &c. should be from time to time referred &c. (then followed provisions for arbitration). The replication proceeded to aver that defendant, at the time of making the said writing obligatory, had notice of the indenture, and of the covenants, agreements &c. therein contained: and that W. Potts was and continued the acting partner of the said copartnership for a long time, to wit from the making &c. until and after the happening of the breaches in the replication set forth. Several breaches were then stated, of which the following only (the seventh) is material.

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“That, after the making” &c., “and whilst the said W. Potts continued such partner in the trade and business of the said copartnership as aforesaid, and after the decease of the said W. Chapman, he the said W. Potts did not nor would well, truly and faithfully make, deliver or transmit a just and true account in writing of all sum and sums of money, cash, notes, bills and other partnership effects which came to the hands of the said W. Potts, or which he was entrusted with by *or on account of the copartnership, but on the contrary thereof, although there came into the hands of the said W. Potts whilst he was such acting partner as aforesaid, and after the making” &c., “and after the

decease of the said W. Chapman, to wit on " &c., "and on divers other days," &c., "and he the said W. Potts was then entrusted with, divers sums of money, cash, notes, bills and other partnership effects, of great value, amounting to a certain large sum, to wit the sum of 50,000*l.*, he the said W. Potts did, to wit at the close of each of the said several years, during the period last aforesaid, make, transmit and deliver, to wit to the said plaintiff, false, fictitious and fraudulent accounts in writing, falsely purporting to be accounts of the said sums of money, cash, notes, bills and other partnership effects, and, although he was then, to wit at the close of each of the said years respectively, requested so to do, did not nor would make, deliver or transmit any just or true account whatsoever of the said sums of money, cash, notes, bills and other partnership effects to the said plaintiff, contrary to the said condition " &c. Verification.

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Rejoinder. As to the seventh breach, that the said W. Potts did not make, transmit or deliver to the plaintiff, false, fictitious or fraudulent accounts, in manner, &c. Conclusion to the country. Issue thereon (1).

On the trial, before Rolfe, B., at the Northumberland Summer Assizes, 1840, it appeared that W. Chapman died in May, 1832; that after his death the business was carried on by the other partners; and that W. Potts, after the death of W. Chapman, and during the subsequent copartnership, was guilty of defaults complained *of in the seventh breach. The defendant's counsel claimed a nonsuit on the ground that the conditions of the bond applied only to accounts which should be rendered to W. Chapman and E. W. Chapman, and therefore that the defendant could not be liable for defaults after W. Chapman's death. The learned Judge gave leave to move for a nonsuit; and the plaintiff had a verdict as to the seventh breach. A rule *nisi* for entering a nonsuit was obtained in the following Term. In Michaelmas vacation, 1841 (2),

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W. H. Watson and *Warren* showed cause, and contended, first, that, at any rate, a nonsuit could not be entered. (The argument on this point is fully stated in the judgment of the Court.) As to the general question on the record. The rule undoubtedly is, as laid down in *Gow on Partnership*, 123 (3rd ed.) c. 3, s. 1, that the

(1) There was also an issue upon a plea of set-off, on which the defendant had a verdict.

(2) November 26th. Before Lord Denman, Ch. J., Williams, Coleridge, and Wightman, JJ.

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prospective operation of a guarantee given to a partnership ceases on the death or retirement of one of the partners, or the addition of a new one, "unless the guarantee itself contain some provision contemplating such change, and continuing its operation to the succeeding partnership." Here the language and provisions of the partnership deed, and the terms of the condition, show that the obligors were responsible to the partnership, not only as it originally stood, but as it might be continued according to the indenture. (The argument on the words of the bond and partnership deed will appear sufficiently in the judgment.) The intention to carry on the liability may be collected from the stipulations here as it was in *Metcalf v. Bruin* (1); *W. Chapman *and E. W. Chapman*, here, standing in the same situation as the trustees in that case. [They also referred to *Strange v. Lee* (2), *Pemberton v. Oakes* (3), *University of Cambridge v. Baldwin* (4); *Weston v. Barton* (5); *Barclay v. Lucas* (6); and *Dry v. Davy* (7).]

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Cresswell, contra :

First as to the bond itself : the condition for accounting contemplates an accounting for monies of the "said copartnership ;" and the whole language of the deed shows this to mean the copartnership between W. Chapman, E. W. Chapman and Potts : whenever that ceased, the undertaking to account no longer applied. *Pemberton v. Oakes* (3) is a direct authority on this point. A condition for rendering an account to a trader and his executors does not make the obligor liable in respect of monies received after the trader's death : *Barker v. Parker* (8). [He also cited *Strange v. Lee* (2), *Barclay v. Lucas* (6), and *University of Cambridge v. Baldwin* (4).]

Cur. adv. vult.

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LORD DENMAN, Ch. J., in the vacation following this Term (December 3rd), delivered the judgment of the COURT :

This was an action brought by the surviving obligee of a bond : and, the condition being set out on *oyer* in the plea, it appeared that the plaintiff and the deceased William Chapman had entered

- (1) 11 R. R. 432 (12 East, 400).
- (2) 3 East, 484.
- (3) 4 Russ. 154.
- (4) 52 R. R. 850 (5 M. & W. 580).
- (5) 13 R. R. 726 (4 Taunt. 673).

- (6) 1 R. R. 202, n. (1 T. R. 291, note (a); S. C. 3 Doug. 321).
- (7) 50 R. R. 314 (10 Ad. & El. 30).
- (8) 1 R. R. 201 (1 T. R. 287).

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into partnership by deed with one Potts; that Potts was to be the acting partner; and that, in consideration of this trust, he and the defendant bound themselves to the plaintiff and William Chapman for the observance by Potts of the covenants in the partnership deed, and also that Potts, during such time as he should continue the acting partner in the said trade of the said copartnership, should faithfully *make and deliver a true account in writing of all sums of money, notes, bills and other partnership effects which should come to his hands, or which he should be intrusted with, by or on account of the said copartnership, and also make good answer for and pay over the monies due on the balance to the said plaintiff and W. Chapman. The plea then averred performance in the words of the condition, as well to the said plaintiff and W. Chapman in the lifetime of the said W. Chapman as to the said plaintiff since his decease. The replication set out the partnership deed at length, and then assigned several breaches, on the seventh of which alone a verdict has passed for the plaintiff: and a rule has been obtained for entering a nonsuit. This breach is in terms framed on that part of the condition of the bond which requires Potts to make and deliver a just account; and alleges that, although there came into his hands while such acting partner, and after the death of the said W. Chapman, and he was then intrusted with divers sums of money and other partnership effects, he did, at the close of each of several years named, make and deliver a false account thereof to the said plaintiff. The ground alleged for the nonsuit is that, by the condition of the bond, the account is to be delivered to the plaintiff and W. Chapman; that, upon the decease of W. Chapman, the bond in this respect was discharged; and that the breach is assigned for a matter happening after that event.

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Two questions were made on the argument; the first, whether the defendant's construction of the condition were correct; and, secondly, assuming that it were so, whether he could be entitled to a nonsuit: and this last, *as being the shortest, it may be convenient to dispose of first.

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The plaintiff's counsel naturally objected that, issue having been taken on the breach, and the breach having been proved, no nonsuit could be entered, and that the fault, if any, was on the record (1),

(1) *Cresswell* suggested in argument that the objection did not necessarily arise on the record, as it did not appear

by the seventh breach that the sums unaccounted for might not have been due before the death of W. Chapman.

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the breach being badly assigned. In answer to this it was ingeniously contended that, the plea to the declaration being of a general performance, the real and only question for the jury was, whether that was true: that, in order to go to them at all, the plaintiff was bound to offer evidence of some breach within the terms of the condition; any breach beyond those terms was wholly immaterial; and therefore, on the assumption that his main objection was well founded, a nonsuit might properly be entered. This argument rests on the particular frame of the record, in which the substantial grounds on which the action rests are postponed in statement till the replication: but the fallacy of it consists in confounding the province of the Court of Nisi Prius with that of the Court in Banc. In the former the issues are assumed to be well raised, and no judgment is passed on them: they are all to be tried; and the verdict on each must be according to the evidence; the only question is, are they proved? There can therefore be no nonsuit in this case.

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But we are bound to look to the whole record, and give judgment notwithstanding the verdict, or arrest it, according as the breaches are well or ill assigned: and *the first or main objection must therefore be considered. As both the condition and the deed to which it refers are set out, we have all the necessary materials before us.

It has been stated above that the condition is two-fold; first, generally, for the keeping the covenants in the partnership deed; and, secondly, for that on which the breach in question is assigned, the transmitting a true account. If we are to determine the question upon the true construction of this latter part, taken by itself, it seems clear that the objection of the defendant is well founded. The condition recites the formation of a copartnership in a certain trade between the plaintiff, W. Chapman and Potts, in which Potts was to be the acting partner, and then stipulates that Potts, so long as he shall continue the acting partner "in the said trade" "of the said copartnership," shall make a true account and pay the balance due to the plaintiff and W. Chapman. The defendant, therefore, has bound himself for the duration of the copartnership in the said trade. If the partners had wholly changed the nature of their business, it could hardly have been contended that the defendant's liability would have continued; and it can be with as little reason contended that it will continue beyond the duration of that copartnership: but the copartnership, in the ordinary sense of the term, was

dissolved by the death of W. Chapman. For the first of these points the case of *Lord Arlington v. Merricke* (1) is, in principle, a direct authority: for the latter, if any be needed, *Vulliamy v. Noble* (2) and *Gillespie, executor of Crawford v. Hamilton* (3) are in point.

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But it was said that, this being a question of construction, the whole condition must be looked to, and the copartnership deed therein referred to, in order to ascertain the meaning of this or any other part of it: and it was urged that from such an examination it would clearly appear that the word "copartnership" must be understood in a sense wider than ordinary, in order to effectuate the clear intention, that the defendant's liability should extend as widely at least as assumed in the breach. The deed shows that the partnership was to endure for twenty-one years (4); and it is provided that, if either of the partners be desirous to withdraw at the end of the seventh year, and should give twelve calendar months' notice, the covenants should absolutely determine as to him, except as to the valuation of stock and compensation for his share; and, further, that any one of the partners should be at liberty to transfer his share, or any part or parts thereof, to any one or more of his sons, and also to dispose of it by will to any person or persons; and, in case of death without such disposition, that it should pass to the executor or administrator, and such son, legatee or representative should be deemed a partner in the concern for all the residue of the said copartnership, subject to the stipulations and covenants in the deed. These provisions, it is said, make it clear that the word "copartnership" is used in the deed and condition to signify, not merely the joint carrying on of the trade by the three parties to the deed, but extends to a carrying it on by any two of them, with or without the assignee or representatives of the third, during the term of years specified in the deed. It is material, however, to observe that the deed contains *no such covenant as the stipulation in that part of the condition on which the breach is assigned, and that the covenants which it does contain as to keeping books and accounting precede these provisions respecting the withdrawal of old or introduction of new partners: and those provisions are only in terms made binding on the parties to the deed.

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(1) 2 Saund. 403.

(2) 17 R. B. 143 (3 Mer. 593, 614).

(3) 3 Madd. 251.

(4) By the dates given on the record it appears to have been eleven years.

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We are now, then, to apply these particulars in the deed on the one side and the other to the construction of this branch of the condition. And, seeing that this branch follows one requiring a general observance of the covenants in the deed, and is clearly an additional stipulation for something not contained in the deed, and that in terms it is to be performed to W. Chapman and the plaintiff with no mention of the survivor, assignee or any other person, we think the more probable and the safer construction will be to give to the word "copartnership" its ordinary legal meaning, limiting it, that is, in duration, to the period during which the same trade was jointly carried on by the same three original parties to the union. Full effect will be given to the intention of the parties to the deed if we construe these stipulations in it as providing, under the circumstances stated, for the introduction of new partners, and the carrying on of the same trade by the new firm, under the same conditions *inter se* as governed the old. All this may well have been without adverting to or intending to alter the legal consequences of such change in the members of the firm: and we ought to be slow in extending by implication the meaning of words beyond that which they ordinarily bear in legal construction, in order to extend the liability of a surety.

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We are strengthened in this opinion by the authority *of a case cited by the counsel for the defendant, which it is difficult to distinguish in principle from the present, that of *Pemberton v. Oakes* (1). There a banking partnership was formed for fifteen years between Harding, Oakes and Willington: it was stipulated that, if Oakes or Willington should die during the term, the concern should be continued by the survivors or survivor, the deceased's share to be paid to his executor up to the death; but, if Harding should die, he might dispose of his share to his wife and children: and there was a provision for his appointing persons who should carry it on, as if he were living, during the minority of his children; and the business was, in that event, to be carried on by the surviving partners and the appointee, in the manner and on the terms and conditions directed by the partnership articles, as if he had not died. Harding made his will in favour of his children as to this share, and appointed persons to carry on the concern with his partners; and, he dying, this was carried into effect. The question was, whether a surety for a customer of the original firm, who had executed a deed to the members of that firm to secure them

for sums already due or which should become due to them for advances to be made thenceforward to the end of the fifteen years, was liable for any advance made after the death of Harding. And the present LORD CHANCELLOR held clearly that he was not liable for advances by a new firm, although he had stipulated to secure advances made during the whole fifteen years; and that the death of Harding, with the substitution of the appointees, though contemplated by the original articles, made a new firm. In this case, it is true, no new partner has been admitted; but that *is immaterial if the death of one of the old ones works a dissolution. And it is true, also, that in this case the defendant (the surety) is averred to have had full notice of the covenants in the partnership deed, a circumstance which did not exist in the case cited: but this also is immaterial, the question turning on the written language of the instruments.

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Many cases were cited to show that, where the surety had covenanted with the house and not the members of the firm, or had stipulated that his liability should not be affected by a change of the members, he would remain liable to the new firm. These cases we do not in the least question, our judgment proceeding on the language of this condition, making all due allowance for the effect which the language of the deed ought to have on its construction.

On these grounds we think the judgment for the plaintiff ought to be arrested.

Rule for a nonsuit discharged.

Judgment arrested.

CHAPMAN v. BEECHAM (1).

(3 Q. B. 723—734; S. C. 12 L. J. Q. B. 42; 3 G. & D. 71.)

B., the owner of land, agreed with C. for the sale of it to him; and, C. not paying the purchase money, and being also indebted to B. in a further sum, B., by indenture to which B. and C. were parties, settled the land to the use of himself in fee, with proviso that, if C. should pay B. the debt, with interest, on a day named, B. should convey to C. in fee: C. covenanted to pay the principal and interest on the day, and that, if default were made therein, B. might enter; but it was agreed that, till default made, C. should hold and enjoy the land: and C. covenanted that, as often as it should happen that the interest was in arrear, it should be lawful for B. to enter and distrain for the arrear, and dispose of the distress as landlords may do in respect of distresses for arrears of rent on leases for years.

C. having entered into possession, B. distrained for interest accruing after

(1) Cited in the judgment of the COURT, *Pollitt v. Forrest* (1847) 11 Q. B. 949, 961.

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the day named for payment of the principal. C. replevied; and B. avowed, under the indenture, the taking, as for and in the name of a distress.

Held, that C., whether he had or had not the legal estate, might create the power of distress, and that the avowry was good on general demurrer, even supposing it to set up only a leave and license.

REPLEVIN, for taking, on 25th November, 1839, in the parish of Hawkhurst, Kent, in a certain dwelling house, shop, warehouse, yard and bakehouse there, in the possession and occupation of plaintiff, the goods, chattels, effects and cattle, to wit &c., of the plaintiff, and unjustly detaining &c.

Avowry. That, long before and at the said time when &c., plaintiff was indebted to defendant in a sum of money, to wit 800*l.*, and that afterwards, and before the said time when &c., to wit 29th August, 1832, by a certain indenture then made between defendant of the one part and plaintiff of the other part (*profert* of the indenture, sealed with the seal of the plaintiff), the plaintiff did covenant, promise and agree with the defendant that he, plaintiff, would pay or cause to be paid unto defendant the said sum of 800*l.*, with interest for the same at and after the rate of 5 per centum per annum, free from taxes and without any deduction except as in the said indenture is excepted, on the 29th day of February next ensuing the day of the date of the said indenture; and, for better securing the payment of the interest of the said principal sum of 800*l.*, the plaintiff *did, in and by the said indenture, grant unto the defendant that, as often as it should happen that the interest of the said principal sum of 800*l.* should be in arrear, in the whole or part, for the space of twenty-one days after any of the times in and by the said indenture appointed for payment of the same (1), it should be lawful for the defendant into and upon the said plot of land, messuage or tenement, buildings or hereditaments, and premises, in the said indenture mentioned, being the said dwelling house, shop, warehouse, yard and bakehouse in the said declaration mentioned, in which &c., or into or upon any part of the same in the name of the whole, to enter, and distrain for the same interest and the arrears thereof, and the distress and distresses then there found to impound and in pound to detain, and in due time to appraise and dispose of the same according to the due course of law, in the same manner in all respects as landlords are by Act of

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(1) No time appeared (from either the avowry or the indenture as after set out) to be appointed for the payment, except the above 29th February: but it appears to have been assumed

in the arguments and judgments that interest at the same rate continued to accrue after the failure to pay the principal on the appointed day.

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Parliament or otherwise authorised to do in respect to distresses for arrears of rent upon leases for years; to the intent that the defendant should, by the same distress or distresses, be paid and satisfied all arrears of the said interest, and all costs occasioned by the non-payment thereof: as by the said indenture &c. That, after the making of the indenture, and before the time when &c., to wit 29th February, 1836, being the 29th day of February next ensuing the date of the indenture, and the day thereby appointed for payment thereof, the principal sum of 800*l.*, and another large &c., to wit *the sum of 60*l.*, for interest thereon, at 5 per cent. per annum, for one year and half of another year, ending 29th February, 1836, became due and payable from plaintiff to defendant, according to the tenor &c. of the indenture: that plaintiff did not pay the 800*l.*, or the 60*l.*, or any part thereof, on or before the 29th of February, 1836, and that the same continued due and unpaid for more than twenty-one days next following, to wit from thenceforward continually until and upon and at and after the time when &c.; whereby another large &c., to wit the sum of 140*l.*, for interest upon the principal of 800*l.* at the rate of 5 per cent. per annum, for a long period, to wit for the period of three years and a half, commencing on a certain day, to wit 29th February, 1836, and ending on a certain other day, to wit 29th August, 1839, became and was due and payable from plaintiff to defendant under the indenture, and, at the time when &c., was, and thenceforth hath been, and still is, due &c. from plaintiff to defendant: by reason whereof defendant says that there was, at the time when &c., due from plaintiff to defendant a large &c., to wit the sum of 200*l.*, for interest on the principal sum of 800*l.* at 5 per cent. per annum, under the indenture, and according to the tenor &c.: and, because the said sum of 60*l.* was so due and owing and in arrear and unpaid from plaintiff to defendant for more than twenty-one days after the 29th of February next ensuing the date of the indenture, and at the time when &c. was still in arrear and unpaid, together with the other large &c., to wit the sum of 140*l.*, for such interest &c., making together 200*l.*, defendant, under and by virtue of the power and authority to him the defendant for that purpose granted by the plaintiff *by the said indenture, the plaintiff long before and at the said time when &c. being in possession of the said dwelling house, shop, warehouse, yard and bakehouse in which &c., well avows the taking of the said cattle, goods, chattels and effects, in the said dwelling house, shop, warehouse, yard and bakehouse, in

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which &c., and justly &c., as for and in the name of a distress under the said power and authority so to him for that purpose granted as aforesaid, for the said sum of 200*l.* so due and owing from the plaintiff to the defendant for such interest as aforesaid, and which still remains due and unpaid: and this he the defendant is ready to verify: wherefore he prays judgment and a return &c.

The plaintiff set out on *oyer* the indenture, which was dated 29th August, 1832, and whereby, after reciting a conveyance of land to such uses as the defendant should appoint, and, in default thereof and subject thereto, to the use of defendant for life, remainder during defendant's life to a trustee and his heirs in trust for defendant, remainder to the heirs of defendant, and that defendant had agreed with plaintiff for the sale to him of the land in fee for 18*l.* 6*s.* 8*d.*; that, since the agreement, plaintiff had erected a messuage or tenement, bakehouse, stable and other buildings, on part of the land; that the purchase money still remained due, and defendant had advanced to plaintiff, for the purpose of erecting the buildings, 616*l.* 13*s.* 4*d.*; and that it had been agreed that the two sums, making together 800*l.*, should be secured with interest thereon to defendant in manner thereafter contained; it was witnessed that, in pursuance of the agreement, and in consideration of the premises, and of 10*s.* paid by plaintiff to defendant, defendant did appoint the land to him, *the defendant, in fee, subject to the proviso thereafter contained, that is to say, that, if plaintiff, his heirs, executors, administrators or assigns, should pay to defendant, his executors, administrators or assigns, the 800*l.*, with interest at 5 per cent. per annum, "on the 29th day of February now next ensuing," the defendant, his heirs or assigns, should and would, at the request, cost and charges of plaintiff, his heirs or assigns, reconvey or reassure the land to the use of plaintiff, his heirs or assigns, in such manner as he or they should direct. Then followed several provisos, covenants, &c.; among which were covenants by defendant for title, and for further assurance; and a covenant by plaintiff to pay the 800*l.* with interest at the day and time before appointed, and that, after default made therein, it should be lawful for defendant, his heirs and assigns, to enter upon and enjoy the land, and that plaintiff and his heirs should, at the request of defendant, his heirs, executors, administrators or assigns, but at the expense of plaintiff, his heirs, executors, administrators and assigns, execute conveyances, &c.; and an agreement and declaration that, until default made in payment of

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the 800*l.* or interest, it should be lawful for plaintiff, his heirs and assigns, to hold and enjoy the land, buildings, &c., and receive the rents and profits for his and their own use and profit, without eviction or interruption by defendant, his heirs, &c., or any one claiming through them; and a covenant and grant corresponding with those set out in the avowry. The plaintiff then pleaded three pleas in bar, of which two only are material here.

1. That plaintiff, at the time of the making of the said indenture, had not, nor at any time since had he, *any estate whatsoever in the said dwelling house, shop, warehouse, yard and bakehouse, or either of them, or any part thereof, whereby he could make the said grant to the defendant, or give to him the said power and authority of distress in the said indenture in that behalf contained, and in the said avowry in that behalf above mentioned. Verification.

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2. The defendant, at the time of the making of the supposed grant of the supposed power and authority of distress in the avowry mentioned, and from thence until and at the time of the making of the said distress in the declaration mentioned, continually, was seised in his demesne as of fee of and in the said dwelling house, shop, warehouse, yard and bakehouse, in the declaration mentioned, and every of them, and had not at any time, during the period aforesaid, demised, or in any manner parted with, any legal interest of and in the same, or any part thereof, to any person or persons whomsoever: by reason of which premises the said supposed power and authority became, and at the said time when &c. were, wholly merged and extinct.

Special demurrer to both the pleas, for causes which were afterwards stated in the argument.

Joinder in demurrer.

W. H. Watson for the defendant in replevin:

The facts stated in the pleas constitute no answer to the avowry: if they did, the plaintiff would be estopped from setting them up. It is not necessary, to justify the taking under the clause set out in the avowry, that the plaintiff should have a legal estate in the land. The clause may be construed as a license to take in the event of non-payment. Such a license may be pleaded in replevin *as well as in an ordinary action of trespass. But, further, if a legal interest in the plaintiff were essential to the defendant's right of distress, then the defendant, by making the grant under seal, is estopped

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from denying that essential fact. It is laid down by Littleton and Lord Coke that, if debt be brought for rent on a lease, the lessee may plead that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, for "then are both parties concluded:" Litt. B. 1, c. 7, s. 58; Co. Litt. 47 b. So, if a disseisor lease to the disseisee, this works a remitter unless the lease be by deed indented: but, if it be, the lease works no remitter, and a reservation of rent in such lease shall be good against the disseisee; and this estoppel would be good, even if the deed were a feoffment in fee reserving a rent or condition, and there were livery of seisin: Co. Litt. 363 b. In *Heath v. Vermeden* (1) it was decided that a lessee by lease indented could not plead *nil habuit in tenementis* to debt for rent. The same doctrine is recognised in *Treviban v. Lawrence* (2). In *Dancer v. Hastings* (3) the plaintiff in replevin was held to be concluded, on an issue upon *non tenuit*, pleaded to a cognizance made under a receiver in Chancery who had demised to the plaintiff. The exception to the rule that a party is estopped by his own deed is where persons are acting as trustees for the public, or where the point arises upon an Act of Parliament of which the Court must take notice: *Fairtitle d. Mytton v. Gilbert* (4). But, further, it appears from *Wilkinson v. Hall* (5) that the effect of this indenture is as if the defendant had demised *to the plaintiff till failure in the payment of interest.

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(LORD DENMAN, Ch. J.: The decision in *Wilkinson v. Hall* (5) was questioned in *Doe d. Parsley v. Day* (6), on the authority of a passage in Shepp. Touchst. 272, which was not brought to the attention of the Court of Common Pleas.)

Alexander v. Bonnin (7) is an authority for the defendant on this point.

(COLERIDGE, J.: Did that case decide more than that the landlord, having parted with the soil, could not maintain trespass for the interruption of a right of way reserved to him?)

It is, however, for the reasons before given, unnecessary to contend that the plaintiff had a legal estate. *Hope v. Booth* (8) may be

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| (1) 3 Lev. 146. | (5) 43 R. R. 728 (3 Bing. N. C. |
| (2) 2 Ld. Ray. 1036, 1048, 1051; | 508). |
| S. C. 6 Mod. 256, 258. | (6) 57 R. R. 624 (2 Q. B. 147, 153). |
| (3) 29 R. R. 740 (4 Bing. 2). | (7) 4 Bing. N. C. 799. |
| (4) 1 R. R. 421 (2 T. R. 169). | (8) 1 B. & Ad. 498. |

cited on the other side : but there the question arose in an action of covenant, on the application of stat. 6 Geo. IV. c. 16, s. 75, the defence being bankruptcy and certificate. Lord TENTERDEN considered that there was a power of distress, and would therefore, in replevin, have upheld the estoppel. An annuitant may distrain for arrears, though a term for years be vested in himself ; and may treat the occupier as his undertenant : *Fairfax v. Gray* (1).

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Platt, contra :

The avowry is bad, taken together with the indenture ; the two showing that there is not that relation between the parties which authorises a distress. A man cannot distrain on his own lands. This was no demise ; and at any rate after default in payment the legal interest of the plaintiff expired, and the rent merged in the estate of the defendant. It is said that this is a mere license : but the avowry claims a right to “ enter, and distrain,” *and justifies the taking “ as for and in the name of a distress.” Indeed it may be contended that the clause in question is nugatory : for the “ February next ensuing the day of the date ” of the indenture was February, 1833. The allegation therefore of the interest becoming due on February 29th, 1836, as the 29th February next after the date of the indenture, is bad. But at any rate this is not rent reserved ; for there is no demise : and, as a grant of a rent charge, the deed is void. It is said, in Shepp. Touchst. 249 : “ If a man grant or charge that which is none of his, and that wherein he hath no property, it being in the grantee, or a stranger ; the grant is void.” “ And albeit the grantor doth afterwards purchase the manor, or the land, yet this will not make the grant good ” (2). In such a case, the grant might have been treated as a license as well as here. In *Doe d. Barber v. Lawrence* (3) it was held that a right of entry cannot be reserved to a stranger to the estate. Then there is no estoppel, because the objection appears on the face of the indenture. “ Where the verity is apparent in the same record, there the adverse party shall not be estopped to take advantage of the truth ; for he cannot be estopped to allege the truth, when the

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(1) 2 W. Bl. 1326.

(2) Sheppard adds : “ But if the grant be by way of fine, or by indenture, there in some cases it shall be good by way of estoppel. And in this case, albeit the party recite that it is his own, yet this will not mend the

case. And therefore if a man recite that he hath a rent of ten pounds a year, and then grant five pounds a year parcel of it ; in this case, if he have no such rent the grant is void.”

(3) 4 Taunt. 23.

CHAPMAN truth appeareth of record : ” Co. Litt. 352 b, cited, Com. Dig.
 v.
 BEECHAM. Estoppel (E 2).

(WIGHTMAN, J. : Why do you call this a rent charge at all ? The parties agree that the interest shall be levied by distress.)

[*732] A charge which is to come out *of the land is a rent charge. Therefore, if this distress be maintainable, the goods of a stranger might have been seized : *Saffery v. Elgood* (1) : and then the result would be that the owner of land may have granted to him a charge on his own land for which he may seize any man’s goods being on that land.

W. H. Watson, in reply, [cited *Hawthorn v. Newcastle, &c. Railway Company* (2).]

[733] LORD DENMAN, Ch. J. :

I cannot understand why the plaintiff should not have the power of granting the right of distress, his possession of the land being undisputed. Perhaps the avowry would have been more correct if it had justified in terms by way of leave and license : the deed would support such an avowry. The objection therefore comes only to this, that the avowry is not sufficiently distinct as to claiming by leave and license. The objection on the words “ next ensuing ” cannot prevail : we cannot refer the words to the last antecedent, February, when by so doing we turn the whole into nonsense : we must refer them to “ the twenty-ninth day.”

WILLIAMS, J. :

The objection turns on the words of the justification, “ as for, and in the name of a distress.” *Mr. Platt* assumes that this creates a difficulty : but, if the words were totally omitted, the avowry would be equally available. The meaning was that, in the event of the money not being paid, the defendant might satisfy himself by seizing goods on the premises.

COLERIDGE, J. :

The whole stands on the agreement of the parties. The title is immaterial. The party in possession says the other may distrain, *eo nomine*. You may call that what you please : the words can make no difference.

(1) 1 Ad. & El. 191,

(2) See note at the end of this case.

WIGHTMAN, J. :

The objection is put as if this were a rent charge issuing out of land. But the plea merely shows that the plaintiff, having possession, is distrained on by virtue of an agreement that, if the interest be not paid, the defendant may distrain for it on these particular lands. As to the other objection, it could at the utmost show only that too much is distrained for : the avowry separates the interest claimed as due on February 29th, 1836, from that due after. If the interest be due only in respect of the time after February, 1836, the defendant has distrained for too much ; but he is still entitled to a return.

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[734]

(1) The following is the case alluded to in the argument, at p. 380.

HAWTHORN AND OTHERS v. THE
NEWCASTLE - UPON - TYNE AND
NORTH SHIELDS RAILWAY COM-
PANY (2).

(3 Q. B. 734, n.—739, n. ; S. C. 9 L. J.
(N. S.) Q. B. 385 ; 2 Ry. Cas. 288.)

A Railway Company contracted with R. that R. should build a bridge for the Company on their railway : R. was to provide implements and materials ; and, if the Company's architect considered that R. did not proceed with proper expedition, the Company, on seven days' notice, might employ other or additional workmen, and, in that case, might use the implements and materials of R. which for the time being should be used by R. in or about the works ; and R. was to repay all additional expenses. The Company were to have a lien on the implements and materials which for the time being should be upon the ground whereon the bridge was to be built, as a security for the completion of the works, R. undertaking to execute such deeds as counsel for the Company should advise for confirming the lien and security.

A *fiat* of bankruptcy issued against R. on 31st July, on which day the

Judgment for defendant (1).

Company took possession of implements and materials used by R. in building the bridge. On 1st August the Company gave notice, as provided in the contract : on 2nd August they commenced completing the bridge, and in so doing used some of the materials, and detained the rest.

1. Held, that the agreement was lawful, not being made in contemplation of bankruptcy.

2. That the Company were not entitled to use the implements and materials till the expiration of the seven days' notice, and that the previous use was a conversion.

3. That they were entitled, after the seven days, to use all implements and materials used by the contractor on any part of the works for constructing the bridge.

4. That they were entitled to a lien upon all such implements and materials, so used, as were upon any land, possessed by the Company, on which the building of the bridge was, in a popular sense, being carried on. But not to a lien upon the materials of a temporary railway constructed for bringing articles to the bridge from an adjoining river, nor to a crane at the end of such temporary railway, not being on the Company's land.

5. But that these last materials

1840.
June 24.
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[734, n.]

(2) Foll. *In re Waugh, Ex parte Dickin* (1876) 4 Ch. D. 532, 46 L. J. Bk. 26.—A. C.

1842.
Nov. 10.
[740]

BEVAN v. GETHING.

(3 Q. B. 740—743; S. C. 12 L. J. Q. B. 37; 3 G. & D. 59; 6 Jur. 971.)

In an action upon a promissory note, to which the Statute of Limitations was pleaded, plaintiff gave evidence that defendant had paid 5s. on account of the note. He then offered to prove that defendant, on a subsequent occasion, admitted orally that he had made such payment on the above account.

Held, that the latter evidence was not excluded by stat. 9 Geo. IV c. 14, s. 1.

DEBT on a promissory note, and on an account stated. Plea (among others) the Statute of Limitations. On the trial, before

were liable to be used by the Company, as above.

6. That these rights of the Company were not invalidated by the possession of the bankrupt, under stat. 6 Geo. IV. c. 16, s. 72 (1), he being the true owner.

7. Nor by other implements and materials, so used, having been removed without any objection from the Company's authority, the lien being a shifting one, and attaching to such articles as were brought from time to time, and ceasing as to such only as were removed.

8. Nor by the implements and materials not being scheduled.

9. The assignees of R. having brought trover against the Company for all the implements and materials above mentioned, the defendants pleaded the contract specially, and alleged that the implements and materials were brought, and used for the bridge, and were on the ground whereon the bridge was to be built; and that defendants had possession by R.'s permission, and continued to possess under the lien. On replication *de injuriâ*: Held, that defendants were entitled to judgment, although the facts did not bring all the articles to which the declaration applied within the

lien, the plaintiffs not having new assigned.

10. The rules as to new assignments apply to trover as well as trespass.

TROVER. The defendants (who were incorporated under stat. 6 & 7 Will. IV. c. lxxvi., local and personal, public), pleaded several pleas, leading to issues of fact. On the trial, before Coleridge, J., at the Spring Assizes for Northumberland, 1838, a verdict was found for the plaintiffs *for 1,387l., subject to be reduced, or a verdict entered for the defendants, upon a case.

The case was stated accordingly: and, in Easter Term, 1840 (May 1st, before Lord Denman, Ch. J., Little- dale, Patteson, and Coleridge, JJ.), Alexander was heard for the plaintiffs and W. H. Watson for the defendants. The following authorities were referred to: *Wilson v. Greenwood* (2), *Tripp v. Armitage* (3), *Crowfoot v. The London Dock Company* (4), *Rouch v. The Great Western Railway Company* (then standing for judgment, since decided) (5), *Manton v. Moore* (6), *Collins v. Forbes* (7), note (6) to *Greene v. Jones* (8), *Freeman v. Crafts* (9), *Routledge v. Abbott* (10), *Alston v. Mills* (11), *Gordon v. The East India Company* (12).

Cur. adv. vult.

(1) See now the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.

(2) 1 Swanst. 471, and note (a) *ib.*, p. 481.

(3) 4 M. & W. 687.

(4) 2 Cr. & M. 637; S. C. 4 Tyrwh. 967.

(5) 1 Q. B. 51.

(6) 7 T. R. 67.

(7) 3 T. R. 316.

(8) 1 Wms. Saund. 300 b.

(9) 4 M. & W. 4.

(10) 8 Ad. & El. 592.

(11) 9 Ad. & El. 248.

(12) 7 T. R. 228.

Coltman, J., at the Monmouth Summer Assizes, 1841, the plaintiff, to take the case out of the operation of the statute, proved that the

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LORD DENMAN, Ch. J., in Trinity vacation (June 24th), 1840, delivered the judgment of the COURT :

The main question in this case arises upon the proper construction to be given to certain clauses in an agreement between the defendants and the bankrupts, and upon their validity in the event, which has arisen, of the bankruptcy of the parties on the one part of the agreement. Several points have been discussed in the argument, it being submitted to us to decide, not only the verdict, but the amount of damages. And the most orderly method of disposing of them will be, first, to consider the agreement itself ; secondly, the circumstances to which it is to be applied, and, lastly, what the conclusion from both will be with reference to the pleadings in the cause.

The defendants, in the construction of their railway, having to throw a bridge over Willington Dean, entered into a contract with the bankrupts, who were builders, for that purpose. These last were to provide, at their own expense, all necessary implements and materials for completing the work ; large powers were given to the architect of the Company in the rejection of improper materials, and the determination whether the work, as it proceeded, was properly done ; “ and, if, in his opinion, the bankrupts should not proceed with sufficient expedition in the performance of the works as directed, it was to be lawful for the Company, or their surveyor, to employ other or additional workmen to complete the works, on giving seven days’ notice of his or their intention so to do : and then, and in such case, it should be lawful for the said Company to use and employ the cranes or other machines, implements and materials, which for the time being should be used by the said bankrupts in or about the said works ; and whatever extra expense might thereby be incurred by the said Company, in completing the

works in a proper manner and with proper expedition, should be defrayed by the said bankrupts and their sureties ; and, further, that the said Company should have a lien upon such machines, implements and materials as should for the time being be in or upon the lands or grounds whereon the said bridge was to be built, as a security for the completion of the works, the said bankrupts thereby agreeing to execute, at their expense, all such deeds and instruments as the counsel of the said Company should advise for completing and confirming such lien and security.” We think it cannot be contended that this agreement, whether entered into by one subject to the bankrupt laws or not, bears any thing unlawful upon its face. It has no professed or necessary reference to the event of bankruptcy : and, assuming the solvency of the contractors, that bankruptcy was not in contemplation, and that they were the owners of the chattels to be affected by the deed, they might certainly stipulate with regard to them as the contractors have by this instrument.

Neither can there be any question as to the extent of its operation in the first branch. Supposing the contingency should arise, and the seven days’ notice be given, the Company would clearly be at liberty to make use of all implements and materials then in use by the contractors in and about the works, whether they happened to be on this or that precise spot. The wording of the latter part, which gives the lien, is more limited : the lien is to attach on such machines, implements and materials as for the time being might be in or upon the lands or grounds whereon the bridge was to be built. It would be in the nature of a shifting lien : as materials were brought on the ground, it would attach to them ; as they were worked up and became part of the bridge, it would cease and merge in actual property ; if they or any of the machines, &c.,

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defendant had, in September, 1835, paid 5s. to the plaintiff's son (who was called as a witness), acknowledging that it was on account

were removed elsewhere, not wrongfully, it would be lost; but the loss of the lien on articles so removed would not affect it as to what remained, or what from time to time should be afresh brought on. Possession of course would be indispensable to the continuance of the lien: but, as it was a lien created by agreement, it would admit of modifications, as to the nature of that possession, and in other respects necessarily to be implied from the subject-matter of the agreement. As to the place where the lien would attach, that also must receive a reasonable interpretation: it would defeat the plain intention of the parties to limit it literally to the spot on which the bridge would be built: comparatively very few of the materials *would be on that spot, until worked up into the bridge itself. The expression "lands or grounds," as well as the reason of the thing, shows that the lien would extend into all places in which the building of the bridge was, in a popular sense, being carried on, if such places were in the possession of the Company, so that they might be considered as having a possession of the articles there placed.

Such being our view of the validity and import of the agreement, we may at once dismiss two points made for the assignees: the removal of machinery from the works from time to time to be used elsewhere without the leave, but without the objection, of the architect; and the fact that no schedule was made of the goods and chattels from time to time brought upon the ground. The circumstances which must be taken to have been in the contemplation of the parties fully account for both these facts, and strip them of all importance.

We come then to the other facts of the case. Acts of bankruptcy were committed on the 26th July; a *fiat* issued on the 31st. On the same day, the Company took formal possession of the articles for which the action is

brought, and put a special agent in charge of them. On the first of August they gave the notice required by the former part of the agreement above stated, and on the second took on themselves the completion of the bridge, and, in building it, have used part of the said articles, and have ever since retained possession of the residue.

Here again we may dismiss some points made in argument. There is no case of apparent ownership; for, down to the date of the bankruptcy, the bankrupts who had a possession were the true owners of the property in question. On the other hand, the Company had no right to begin to use the articles on the 2nd, or at any time before the seven days' notice had expired: and the user for that time was a conversion. At the end of the seven days, however, their right would begin, and the subsequent user would be lawful. No point was made, and very properly, of the former possession taken by the Company on the 31st, which was certainly consistent with their previously having such a possession as would suffice for the lien.

We come now to the articles which have been so used. And the case divides them into four parts. The first division in value, amounting to 61*l.* 13*s.* 6*d.*, were actually upon the line of the railway, on land the absolute property of, and in the possession of, the Company. Upon these it was hardly contested that the lien would attach, if it attached at all. The second, of the value of 63*l.* 13*s.* 9*d.*, were upon land adjoining the line, and in possession of the Company: these also, in our opinion, fall under the lien, giving to the expressions which limit its range the reasonable interpretation which we think we are bound to do. The third class, of the value of 7*l.* 16*s.* 9*d.*, were one temporary railway constructed for the purpose of bringing materials from the Tyne to the bridge, and the materials of the temporary railway itself, of the value

[*737, n.]

of the note in question. The plaintiff then called his attorney, who stated that the defendant had, since this action was commenced,

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of 131l. 15s. 4d. And the *fourth was a crane, of the value of 50l., erected at the water's edge at the end of the temporary railway. We think that the lien did not attach upon these. We doubt whether the first two were ever in the possession of the Company: the last clearly was not: and neither were within the prescribed local limits. But, although not subject to the lien, they were both within the former clause of the agreement, and, at the expiration of the notice, might lawfully be retained, used and employed by the Company in and about the work.

It only remains to refer to the pleadings and, applying these facts to them, to draw the right conclusion as to the verdict to be entered. The declaration is in trover, containing the two usual counts. The pleas (after the first of Not guilty, on which nothing turns) are in sets; the second and fourth traversing the possession of the bankrupts, and the assignees, respectively; the third and fifth setting out the special agreement. It will be sufficient to consider the effect of the second and third. With regard to the first of these, if it stood alone, some questions of nicety might arise, its applicability to the defence contemplated, and its sufficiency to furnish any answer with regard to the third and fourth class of articles above enumerated. But it seems to us that the third plea is a sufficient defence for the Company.

It must be remembered that no question arises upon the goodness of the plea; we are only to consider its extent, and whether it has been proved. It commences with stating the possession by the bankrupts of all the goods and chattels mentioned in the first count; then sets out the agreement with both the clauses stated above; then avers that, before the bankruptcy, and after the making of the indenture, they brought the goods and chattels to and upon the lands and grounds whereon the bridge was to be

built, for the purpose of constructing it, which lands and grounds were in the possession of the Company; and that afterwards, and before the bankruptcy, the Company had possession of them by the consent and delivery of the bankrupts, and still have possession of them, and exercise the lien upon them in the indenture mentioned, and had and received them for that purpose: and they conclude, averring a continuance of the possession in the same right, and for the same purpose, the bridge being still incomplete. To this plea the replication, admitting the indenture, is *de injuriâ* as to the residue.

We have stated already that this defence does not cover the whole grievance proveable under the declaration; but we think this objection received the proper answer at the Bar. The plea professes to cover every thing in the declaration; it places all the goods and chattels within the prescribed limits; it avers a possession taken and retained only by virtue of the lien granted by the deed. If the plaintiffs intended to rely on the use of any of the articles too soon, or on a possession of articles not within the local limits, which made them subject to the lien, they should have newly assigned; and, not having done so, these matters cannot be *taken into consideration. It is true that a new assignment is a novelty in trover, as in assumpsit; but that must be attributed to the practice before the new rules of giving nearly every matter in evidence under the general issue. Now that these forms of action are made subject to the same rules of special pleading as trespass, the consequences will follow in every stage. And, as a new assignment would certainly have been necessary if the declaration had been in trespass, it will be equally so now.

We are of opinion therefore that a verdict ought to be entered, on the third and fifth issues, for the defendants.

[*738, n.]

[*739, n.]

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admitted having paid the 5*s.* to plaintiff's son on account of the note. The evidence was objected to, but received; and the plaintiff had a verdict. Talbot in the ensuing Term, obtained a rule nisi for a new trial.

Godson now showed cause:

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Stat. 9 Geo. IV. c. 14, s. 1, enacts that, in actions of debt on simple contract, "no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation" of the Statute of Limitations, "or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing" &c. The effect of payments is preserved by a proviso in that section: though it is true that an oral acknowledgment of having paid money on account within six years was held insufficient in *Willis v. Newham* (1): and *Bayley v. Ashton* (2) supports this decision. *But in *Waters v. Tompkins* (3), part payment having been proved otherwise than by admissions, it was held that oral declarations were receivable to show that the payment, when made, had been appropriated to the debt in question. *Moore v. Strong* (4) and *Trentham v. Deverill* (5) also show how far evidence of this kind is admissible to support or explain other proof of a payment. In the subsequent case of *Maghee v. O'Neil* (6), where the decision in *Willis v. Newham* (7) was adhered to, Lord ABINGER, C. B. said: "If this question were *res integra*, I should certainly say that the mode of payment of principal or interest was left by Lord Tenterden's Act to be proved as at common law. But we are not sitting here as a court of error." "My impression however, is, that the Act of Parliament has been pressed beyond its intention." And PARKE, B., referring to *Willis v. Newham* (7) and *Bayley v. Ashton* (2), said: "My feeling certainly is, that those decisions have gone too far; but sitting as we do, with a co-ordinate jurisdiction only, we cannot overrule the judgment of the Court of Queen's Bench." He intimated, however, that the plaintiff might, in a fresh action, bring error: and he added: "If it comes before us in that shape, I shall then hold myself fully at liberty to consider it

(1) 3 Y. & J. 518.

(2) 12 Ad. & El. 493.

(3) 41 B. R. 827 (2 Cr. M. & R. 723; *S. C.* Tyr. & G. 137). See, as to this and the last cited case, *Edan v. Dudfield*, 55 B. R. 258 (1 Q. B. 302,

307).

(4) 1 Bing. N. C. 441.

(5) 3 Bing. N. C. 397.

(6) 7 M. & W. 531.

(7) 3 Y. & J. 518; *S. C.* Tyr. & G. 137.

independently of the cases." The present objection would go even farther than those which were held good in the cases thus commented upon in the Court of Exchequer.

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Whateley, contra :

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The question is, not whether the effect of this piece of evidence was more or less important in the particular case, but whether or not it would have been admissible if it had stood alone: if it would not, the fact that other evidence of payment was given cannot render this more legitimate. *Willis v. Newham* (1) (expressly recognised as a binding authority in *Bayley v. Ashton* (2) and *Maghee v. O'Neil* (3)) decides the present case. The distinction introduced by *Waters v. Tompkins* (4) is perhaps too refined; but at all events the case does not apply, as the real question here is not of appropriation but of the payment itself. To hold this evidence admissible would let in all the mischief which the clause of stat. 9 Geo. IV. c. 14, requiring a written acknowledgment, was intended to prevent.

LORD DENMAN, Ch. J. :

I think the statute does not apply to this case. The fact of payment was proved. The acknowledgment was put in only to show the probability that it was correctly proved. Stat. 9 Geo. IV. c. 14, s. 1, says that "no acknowledgment or promise by words only shall be deemed sufficient evidence." Here proof is given by words, but by other evidence also.

WILLIAMS, J. :

Sect. 1 has a proviso "that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest." The present case turns upon that clause. Here, some proof of a payment was given. Nothing in the statute prevents the adducing of evidence to sustain that fact.

COLERIDGE, J. :

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I felt pressed by the argument for the defendant: but I cannot distinguish this case from *Waters v. Tompkins* (4): and I rely rather on that authority than on principle.

(1) 3 Y. & J. 518.

(2) 12 Ad. & El. 493.

(3) 7 M. & W. 531.

(4) 41 R. R. 827 (2 Cr. M. & R. 723;
S. C. Tyr. & G. 137).

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WIGHTMAN, J.:

Waters v. Tompkins (1) decides the precise point now before us. Evidence of oral declarations is not sufficient to prove a payment, but may be received to corroborate other proof of that fact.

Rule discharged (2).

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(3 Q. B. 744—756; S. C. 12 L. J. Q. B. 88; 3 G. & D. 549; 7 Jur. 323.)

The Blackwall Railway Act, 6 & 7 Will. IV. c. cxxiii., enabled the Company to make the railway in a certain line, and to purchase lands, and required them to make compensation for damage; the purchase money and compensation to be assessed, in case of disagreement, by a jury, who should be summoned on the Company's warrant to the sheriff. By sect. 50, if any person should be applied to by the Company to sell part of a house &c. in his actual occupation, and should offer to treat with them for the whole, and they should refuse, such person was not to be compellable to sell less than the whole. By sect. 51, if any dwelling-house, &c. situate within fifty feet of the railway, should be deteriorated by it, and the owner should require the Company to purchase the same, they were required to treat for the purchase, compensation &c.; the amount, in case of disagreement, to be settled by a jury, as in other cases: proviso that in no case should the Company be compelled to purchase any portion of any dwelling-house &c., which portion was situate at a greater distance than fifty feet from the railway: further proviso, that the Company, whenever called upon to take part of such dwelling-houses &c., might at their option take the whole, subject to payment of compensation &c. Stat. 2 & 3 Vict. c. xcv. provided that, if the Company should not, on request, issue their warrant for a jury within twenty-one days, the party claiming compensation might send a precept in writing to the sheriff, who should thereupon summon a jury &c.

The Company were required to purchase a public-house, forty-four feet in depth, the greater part of which was within fifty feet of the railway, but a portion, comprising the bar, and varying in depth from thirteen to sixteen feet, was more than fifty feet from the railway: and it was alleged that the premises were deteriorated by the railway, and that, if the former portion only were purchased, the residue would be useless to the owner. Held that compensation was claimable for the whole.

The owner gave notice to the Company to purchase the whole premises, stating them to be situate within fifty feet of the railway; and to make compensation for goodwill, &c. This not being done, he required them to summon a jury who should determine whether he was entitled to have the said premises purchased and compensation made as before demanded, and should assess the sums payable. No answer being given, he sent a precept to the sheriff, stating the premises to be within fifty feet of the railway, and deteriorated by it, reciting the previous notices, and requiring the sheriff to summon a jury to inquire whether the property in respect of

(1) 41 R. B. 827 (2 Cr. M. & R. 723; 415 (7 Bing. 163); *Eastwood v. Saville*, S. C. Tyr. & G. 137). 9 M. & W. 615.

(2) See *Haydon v. Williams*, 33 R. B.

which his claims had been made, was deteriorated by the railway, and whether he was entitled under the statutes to have the said property purchased and compensation made as claimed, and, if so, to assess &c. The sheriff, on the inquiry, finding that part of the dwelling-house was more than fifty feet from the railway, refused to hear further evidence, and directed the jury to find that the claimant was not entitled to have his property purchased by the Company, part of it not being within fifty feet &c. On motion for a *mandamus* to the sheriff to execute the precept,

Held that the requisition, though it did not properly follow the original demand, nor state rightly the purpose for which the jury should be summoned, was sufficiently correct to have been acted upon by the sheriff. *Mandamus* granted.

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A RULE *nisi* was obtained in last Michaelmas Term, for a *mandamus* calling upon the sheriff of Middlesex to proceed to execute a precept signed by Samuel Walker, requiring the said sheriff to impanel, summon *and return a jury for the purpose of determining certain matters in dispute between Walker and the above-named Company.

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Stat. 6 & 7 Will. IV. c. cxxiii., local and personal, public, “for making a Railway from the Minories to Blackwall” &c., incorporates the Company, empowers them to make the railway in a certain line, to take lands, and to treat for the purchase &c., and requires them to make satisfaction for damage &c.: sects. 1, 6, 9, 11. Sect. 22 (1) provides for summoning a jury (on warrant from the Company to the sheriff) to assess purchase money for lands and compensation for goodwill &c. or for damage in case of disagreement or disability &c. Sect. 28 contains provisions as to notice, which are sufficiently stated in the judgment of the Court, p. 395, *post*.

Sect. 50 (2) enacts: “That if any person or corporation, by this Act authorised to sell and convey any lands, shall be applied to by or on behalf of the said Company, to treat for, sell, dispose of, or convey any part of any house, garden, yard, warehouse, building or manufactory, in the actual occupation of one person or several persons jointly, and shall by notice” &c., “signify his inclination or desire to treat for, sell, dispose of, and convey the whole of such house, garden” &c.; “and if it shall happen that the said Company shall not think proper or be willing to purchase the whole of such house, garden” &c., “then and in every such case, nothing in this Act contained shall extend or be construed to extend, to compel such person or corporation interested therein, to treat for, sell, dispose of, or convey, or to authorise the said Company to take or use part only or less than the whole of such house, garden,” *&c.

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(1) Cf. Land Clauses Act, 1845 (8 Vict. c. 18), s. 41. (2) *Ibid*, s. 92.

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“any thing herein contained to the contrary thereof in anywise notwithstanding.”

Sect. 51 is as follows: “And whereas the said railway is intended to pass through or along divers streets, lanes” &c., “in the parishes” &c., “and the hamlet” &c., “and also close to or adjoining divers dwelling-houses or shops in the said parishes and hamlet, and it may happen by reason of the construction thereof, that the said dwelling-houses or shops may be greatly deteriorated in value: be it therefore further enacted, that in case any such dwelling-houses or shops which shall be situated within fifty feet from the said railway, shall be deteriorated in value, and the owner or owners, lessee or lessees of any such dwelling-houses or shops within the said parishes or hamlet or either of them, shall, by notice in writing to be left at the office of the said Company require the said Company to purchase the same, it shall be lawful for the said Company, and they are hereby required within thirty days after the service of such notice to treat for the purchase of the dwelling-houses or shops mentioned in such notice, and for the compensation, recompense or satisfaction to be made to him or them for any loss, damage or injury in respect of any goodwill, tenant's fixtures, improvements or otherwise occasioned by the taking thereof; and in case the party so giving such notice, and the said Company shall not agree as to the value of such dwelling-houses or shops or as to the amount or value of the satisfaction, recompense or compensation to be paid for such goodwill, improvements, tenant's fixtures or otherwise, then the amount of such satisfaction, recompense or compensation shall be ascertained and settled by the verdict of a jury in the manner hereinbefore *described, for ascertaining and settling the value or recompense for other lands, tenements, hereditaments and premises to be taken or purchased for the purposes of this Act: Provided always, that no party shall be entitled to receive any compensation under the above enactment unless the jury to whom it shall be referred to ascertain the amount thereof, shall, by their verdict, determine that the property in respect of which the same is claimed, has been deteriorated in value by the construction of the said railway: “Provided also, that” no party shall be entitled to such compensation, nor the Company be compellable to purchase such property after twelve months from the opening of the railway: “Provided always, that in no case shall the said Company be compellable to purchase any portion of any dwelling-house or shop, which portion is situate at a

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greater distance than fifty feet from the said railway: Provided always, that the said Company whenever called on to take part of such dwelling-houses or shops as aforesaid, may at their option take the whole subject to payment of the compensation herein-before mentioned."

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Stat. 2 & 3 Vict. c. xcv., local and personal, public, (for extending the line of the said railway, and amending the Acts relating thereto) enacts, sect. 22, that in cases of dispute between the Company and parties claiming compensation, where the Company do not, on request, issue their warrant for a jury within twenty-one days, the claimant may send a request to the sheriff, who shall summon and impanel a jury &c.

Samuel Walker was the owner and occupier of a tavern and dwelling-house in the parish of St. George in the East, Middlesex, which (by his affidavit in support *of the present application) he alleged to be situated within fifty feet of the railway, and to have been deteriorated in value by the railway being constructed so near it. He applied to the Company to purchase the whole of the premises (1), making compensation for goodwill &c., which application was not noticed. He then gave them notice to issue their warrant within twenty-one days for the purpose of causing a jury to be summoned, to determine whether he was entitled according to the statutes to have the said dwelling-house or public-house purchased and compensation made as before demanded, and to assess the sums payable; and he annexed particulars of his claim. This notice being disregarded, Walker served the sheriff with a precept reciting as follows: "Whereas I am the owner and lessee for a term of thirty-one years from" &c. "of the dwelling-house now used and occupied by me as a public-house, and called" &c., "which said dwelling-house or public-house is situated in the road called" &c., "in the parish" &c., "within fifty feet of the London and Blackwall Railway, and has been and is deteriorated in value by reason of the construction of the said railway: and whereas" &c., setting out the previous notices: the precept then required the sheriff to impanel, summon and return a jury to inquire "whether the said property in respect of which the said claims have been so

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(1) "All that leasehold estate and premises situate" &c., "known by the name or sign of the 'Duke of Cumberland's Head,' public-house" &c., "held for a term" &c., "at the rent" &c. "And further take notice that

the premises before mentioned are situated within fifty feet of the said railway, and that I require the sum" &c.: 4,000*l.* for lease and goodwill, and 500*l.* for loss by removal, &c.

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made by me upon the said Company as aforesaid has been and is deteriorated in value by reason of the construction of the said railway, *and whether I am entitled according to the form of the statutes in such case made and provided to have the said property purchased of me by the said Company, and to have such compensation made to me in respect thereof as aforesaid, according to my said claims in that behalf: and, if the said jury shall so find, then they shall by their verdict determine and declare that the said property has been deteriorated in value by reason of the construction of the said railway, and shall also by their said verdict assess and determine" the amount of purchase money and compensation &c.

Walker's affidavit then stated that a jury was accordingly impannelled &c., and viewed the premises; and that, after the complainant's counsel had opened his case, John Bax Shepherd, a surveyor, was called, and stated "that the entirety of the said dwelling-house was not situated within fifty feet of the said railway, but that a small portion of the said dwelling-house, abutting upon the high road, was beyond the said fifty feet, but that such portion beyond and out of the said fifty feet did not exceed thirteen feet:" "that the said dwelling-house and premises could not be severed or divided, and that a perpendicular line drawn at right angles to the high road would leave only the front of the said dwelling-house beyond the said fifty feet and the remaining chief part of the said dwelling-house and premises within fifty feet of the said railway." The counsel for the Company then objected to the reception of any evidence to show the value of the premises, or their deterioration, contending that, because the entirety was not within fifty feet, the Court had no jurisdiction to assess the value, or to proceed with the inquiry: and the undersheriff, who presided,
 [*750] refused *to hear any evidence and to allow the inquiry to proceed, and told the jury that the claimant was not entitled under the Act to have the premises purchased. The surveyor also made affidavit that the extent of the premises from back to front was forty-four feet eight inches, of which thirteen feet only, on the west side, and sixteen feet on the east side, were more than fifty feet distant from the railway; and that, if the Company purchased only that portion which was within the fifty feet, the remainder would be valueless and of no use to the complainant, and the dwelling-house would be destroyed and unfit for use or habitation.

The affidavits in opposition to the rule stated that the portion of

the complainant's public-house nearest to the railway was eighteen feet from it; that the part occupied as the bar and chief place of business was more than fifty feet from the railway; and that the public-house was not deteriorated in value by the construction of the railway, unless any injury had arisen from the removal of houses and consequent loss of custom. They stated also that, after argument on the objection, before the undersheriff, the claimant's counsel tendered evidence of the deterioration in value, but the undersheriff rejected it on the ground that the whole premises were not within the fifty feet, and directed the jury to find in the words following: "That the claimant is not entitled to have his property purchased by the London and Blackwall Railway Company, a portion thereof not being within fifty feet of the said railway:" and the jury found accordingly. In last Trinity Term (1).

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Sir W. W. Follett, Solicitor-General, showed cause:

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The undersheriff acted rightly. Stat. 6 & 7 Will. IV. c. cxiii., s. 51, differs from stat. 3 & 4 Will. IV. c. xlvi. (local and personal, public) s. 46, which was under the consideration of the Court in *Reg. v. London and Greenwich Railway Company* (2). Here the enactment is (s. 51), that the Company shall not be compellable to purchase any portion of a dwelling-house which portion is situate more than fifty feet from the railway; and that, when called upon to take part of such dwelling-house, they may, at their option, take the whole. The demand was that the whole of the premises should be taken; and the precept was for summoning a jury to assess compensation in respect of the entire property. When it appeared that part of the property (it is immaterial how much) was not within fifty feet of the railway, the undersheriff was bound to stop the inquiry. It is not clear that the Company were bound to take even the portion which was within fifty feet; but at all events the requisition to them should have been to purchase that portion, or to act upon the option, given them by the statute, of taking the whole. Having made an erroneous demand, the claimant was not entitled, on its being disregarded, to proceed upon stat. 2 & 3 Vict. c. xcv., s. 22.

Sir F. Pollock, Attorney-General, *contra*:

The language of stat. 6 & 7 Will. IV. c. cxiii., s. 51, shows that

(1) June 9th. Before Lord Denman, Ch. J., Patteson, Williams and Coleridge, JJ.
(2) *Ante*, p. 186.

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the Company are at least bound to take the portion which is within fifty feet. It was not necessary for the claimant in his notice, to state that so much of the property was within fifty feet, and so much was farther *off. It would be for the jury to ascertain how much was or was not within the distance, and assess accordingly ; and the notice, comprehending the whole property, would be good for each part.

(COLERIDGE, J. : If you had not required them to take the whole they might have agreed as to part without a jury.)

If nearly the whole is to be sold, a small part beyond the fifty feet, remaining useless, ought not to be severed in the compensation.

(COLERIDGE, J. : You had no right to go before a jury till the Company were in default.

PATTESON, J. : Your original demand should have been that they should take so much as was within fifty feet. They might have agreed to that.)

If the complainant fails here, a claim might be defeated in the same manner if one inch were beyond the fifty feet.

(PATTESON, J. : And, according to your argument, the Company must take the whole if one inch were within the fifty feet.)

It might be left to the jury to say how much was within, and how much without.

(PATTESON, J. : They are summoned to assess compensation for the whole.)

Practically, the whole house here is within fifty feet ; and probably a jury would have so found. The proviso which exempts the Company from purchasing where a portion comes within fifty feet of the railway is introduced for their exclusive benefit, and must be construed rigidly as against them, but favourably to the public.

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (November 25th), delivered the judgment of the COURT. After stating the nature of the application, his Lordship proceeded :

The fact is that the sheriff has summoned a jury, but was of

opinion, when the precept was openly read, that *it did not authorise him to take their verdict on the amount of compensation claimed in respect of the public-house, the intended subject of the inquiry. The claimant in effect appeals to us against the decision; and if it has been erroneous he has been deprived of the right conferred upon him by law, and may now compel the execution of the precept.

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The claim is preferred under the fifty-first section of the Act for constituting this Company, 6 & 7 Will. IV. c. cxxiii. (local and personal, public). (His Lordship then read sect. 51 (1), as far as the words “ purposes of this Act.”) Four provisoes are added, one imposing a limitation of time, the other three connected, perhaps, in some measure, with the present argument, and therefore fit to be stated and considered here. The first is that no party shall be entitled to receive compensation unless the jury shall by their verdict determine that the property has been deteriorated in value by the construction of the railway. The second, that the Company shall in no case be compellable to purchase any portion of any dwelling-house or shop which portion is situate at a greater distance than fifty feet from the railway. The third, that the Company, whenever called on to take a part of such dwelling or shop, may at their option take the whole, subject to payment of the compensation hereinbefore mentioned. The same remedy is therefore given to the owner of a house situate within fifty feet of the railway as to the owner of lands or tenements taken and purchased by the Company. That remedy, afforded by sect. 22, is for the Company to issue their warrant to the sheriff for summoning a jury, *who are to assess and give the purchase money, and also the sum to be paid for satisfaction, recompense, or compensation, for goodwill &c., and for all damage sustained or to be sustained from the Company’s acts. The twenty-eighth section also provides that notice of the nature, extent and particulars of the loss or injury, and of the compensation claimed, shall be given ten days before the summoning of the jury, and within six months after the injury done. There is also a provision (sect. 50) that, if any owner shall be applied to to sell a part of any house &c., and shall express a desire to sell the whole, the Company shall not compel him to sell such part, but shall be bound to purchase the whole.

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Let us now see the position of the claimant, and consider the

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steps taken by him. He is the owner of the lease of a public-house which, as he says, is situate within fifty feet of the railway. After submitting his claim to the Company, who paid no attention to it, he required them to issue their warrant to the sheriff in order to inquire whether the said property has been and is deteriorated in value by reason of the construction of the said railway, and "whether I am entitled" "to have the said property purchased of me by the said Company," and have such compensation as therein mentioned: and, if I am found so entitled, to assess the compensation money. On the jury being assembled, the Company's learned counsel objected to all evidence of the value or deterioration of the premises, on the ground that the entirety of them was not within fifty feet, it appearing that the greater part of the house was within that distance. The undersheriff allowed this objection; and nothing was done.

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We are now to consider whether the objection was *well founded. We are of opinion that any house, of which a very large proportion is within fifty feet, ought to be called a house within fifty feet. This would be so held by a jury, if called to pronounce a verdict on such an issue. In the absence of any appropriate jurisdiction for deciding it, there is strong reason for holding the Company to the rule of construing the words of parties most against themselves. The proceedings of the Company may, according to the admission of their own Act, be so injurious to houses so described as to call for the remedy which it provides; and, though the description is not perfect, there are pretty clear indications of the intention of the Legislature; the compensation must be attained through the medium of a verdict, and must be ascertained and settled as in purchases; and we have just seen that no owner of a house purchased is bound to part with a portion of it only. If they will take any part of a house, they are compellable to purchase the whole of it. If then they come within fifty feet of a house, and thereby deteriorate that house in value, the compensation must be settled in the same manner, that is for the whole house at the owner's option. The Company have also an option. They are in no case compellable to purchase any portion of a house, which portion is more than fifty feet from their railway and, whenever called to take a part, they may have the whole if they prefer it, subject to compensation. From these words an argument is deduced that the Company, though free to take the whole, is not compellable to do so. But we do not think the

inference just. The proviso seems indeed to be framed on the erroneous supposition that the Act had given power to the owner to compel the purchase of a part *of a house, and had then cut down that power, giving the Company the option: but from such a mistake we cannot reasonably infer that the Company were intended to be free to buy the whole or a part as they thought proper, when it is plain that the purchase of a part might be ruinous to the whole, and when, in the analogous case of taking and purchasing, the option of parting with the whole is given to the owner if a part only should be required by the Company. The claimant's requisition to the Company appears to have put forward his claim correctly. After giving them information of his term and interest in the premises, stating them to be situate within fifty feet of the railway, it requires a certain sum as the price of the house, &c., and another for compensation in respect of loss and damage. The precept is different; for, though it describes the house as standing within fifty feet, it refers that question to the opinion of the jury, who possess no jurisdiction if it be not in fact and in law within that distance, but who are bound by the Act to declare whether the property is deteriorated, and what ought to be paid if it is within that distance. But though this point may have been improperly raised by the claimant's precept, there is no reason for barring him of the compensation which he claimed correctly for the value of the house, if that house stands at such a distance as to found the right to compensation.

We think, for these reasons, that the sheriff was wrong: and the rule must be absolute.

Rule absolute.

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(3 Q. B. 760—767; S. C. 12 L. J. Q. B. 72; 3 G. & D. 239; 7 Jur. 38.)

A Bridge Act (9 Geo. IV. c. c.), authorised Commissioners to borrow money by way of mortgage of the bridge and the tolls thereof; and enacted that the several mortgagees should be entitled in proportion to their interest, and without preference by reason of priority.

The Commissioners executed two mortgages, one later in date than the other. The later mortgagee having brought ejectment against the Commissioners: Held, that the Commissioners were estopped from setting up the fact of an earlier mortgage to defeat the legal estate of the lessor of the plaintiff.

THIS was an action of ejectment for toll-gates and toll-houses, tried before Tindal, Ch. J., at the Croydon Summer Assizes, 1841.

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The lessor of the plaintiff claimed as assignee of two mortgages, both of the same date, made by the Commissioners under stat. 9 Geo. IV. c. c., local and personal, public ("for building a bridge over the river Thames at Staines in the county of Middlesex," &c.), to Sir Edward Banks. The defendant was the clerk to the Commissioners. The mortgage was in the following form, prescribed by sect. 76 of the local Act.

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"Number 120.

"By virtue of an Act passed in the ninth year" &c., "we, five of the Commissioners appointed for carrying the said Act into execution, in consideration of the sum of 500*l.* to us advanced by Sir Edward Banks of the Adelphi in the county of Middlesex, do grant and convey unto the said Sir Edward Banks, his successors, executors, administrators and assigns, the said bridge, and the toll-house and toll-houses thereunto belonging, and all and singular the tolls arising by virtue of the said Act, and all our right, title and interest of, in and to the same, to hold unto the said Sir Edward Banks, his successors, executors, administrators and assigns, until the said sum of 500*l.*, with interest for the same after the rate of 4*l.* 10*s.* per cent. per annum, shall be fully paid and satisfied. Given under our hands and seals, this 14th day of February, in the year of our Lord 1831."

(Signed and sealed by the five Commissioners.)

This instrument being proved, the defendant, in answer, produced a mortgage in the same form, and still in force, of November 26th, 1828, whereby the Commissioners granted the bridge, toll-houses and tolls to another party to secure payment of 250*l.* By this instrument, as was alleged on the defendant's part, the legal interest was vested in the prior mortgagee, so that the lessor of the plaintiff could have no title on which the present action could be supported. TINDAL, Ch. J. reserved leave to move to enter a nonsuit: and the plaintiff had a verdict. *Thesiger*, in the ensuing Term, obtained a rule to show cause why a nonsuit should not be entered.

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Platt and Chambers now showed cause :

Stat. 9 Geo. IV. c. c., s. 75, empowers the Commissioners to borrow money "by way of mortgage of the said bridge and the tolls thereof," or by way of annuity, and "to grant or assign over the said bridge and the tolls thereof as a security for any sum" to

be borrowed &c. Sect. 81 enacts "that the several persons to whom any such mortgages, or any such grants of such annuities shall have been made as aforesaid, shall be severally entitled, in proportion to the annual amount of the interest of the monies borrowed on mortgage, and the annual amount of the said annuities, to the tolls and revenues of the said Commissioners, without any preference by reason of the priority of date of any such security or any other account whatever." Assuming, then, that the prior mortgagee, if he had thought proper, might have brought ejectment as having the legal interest in himself, yet, he not having done so, and the statute taking away all "preference by reason of the priority" of date, the subsequent mortgagee may sue as if there had been no conveyance earlier than his own. And, further, the Commissioners, who are virtually the defendants, cannot set up their own deed to defeat a conveyance executed by themselves: *Lindsey v. Lindsey* (1), *Doe d. Ogle v. Vickers* (2), *Doe d. Hurst v. Clifton* (3).

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Thesiger and Cleasby, contrà :

Stat. 9 Geo. IV. c. c., being a public Act, operates as notice to all the world of the nature of the powers possessed by the Commissioners. Sect. 81 contemplates successive mortgages. *Fairtitle d. Mytton v. Gilbert* (4) shows that the Commissioners, *acting in a public trust, are not estopped from contending that any act which they have done is beyond their powers. Besides, estoppels are to be taken strictly; here the record does not show that the defendant is sued as clerk to the Commissioners.

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(LORD DENMAN, Ch. J.: But that appears clearly enough, if the ground of estoppel be good.)

The mortgages must have the ordinary legal effect of such instruments: each professes to convey all the property. The legal estate is therefore in the first mortgagee. An inference to the same effect may be drawn from stat. 3 Geo. IV. c. 126, where the Legislature has protected the subsequent mortgagee by an express clause, sect. 49; which shows that the ordinary consequences of such instruments would prevail in default of express provision. In *Doe d. Banks v. Booth* (5) it was held that the legal consequences of a

(1) Cited, Bull. N. P. 110.

(2) 4 Ad. & El. 782.

(3) 4 Ad. & El. 809, 813.

(4) 1 R. R. 455 (2 T. R. 169).

(5) 5 R. R. 575 (2 Bos. & P. 219).

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mortgage must attach to a conveyance of this kind. So in *Doe d. Thompson v. Lediard* (1) it was held that one of such mortgagees acquired a legal estate on which ejectment might be maintained.

(LORD DENMAN, Ch. J. : One difficulty there was to make a legal estate of so fluctuating an interest: we thought, however, that the Act of Parliament enabled us to do so.)

Further, the later mortgagee has either no estate, or one which is subsequent to that of the earlier mortgagee. In either case, the earlier mortgage must take effect. Even if the two interests were equal, why should the later mortgagee defeat the right of the earlier one?

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The COURT, at the close of the argument, gave permission to *Cleasby* to hand in a list of authorities on the doctrine of estoppel, as applicable to the present case: and, *on a subsequent day, *Cleasby* delivered to the Court a list containing references to the following authorities: Co. Litt. 352 b, *Tappenden v. Burgess* (2), *Right d. Jefferys v. Bucknell* (3), *The Stratford and Moreton Railway Company v. Stratton* (4), *Hill v. The Manchester and Salford Water Works Company* (5), *Doe d. Preece v. Howells* (6), *Doe d. Baggaley v. Hares* (7), *Doe d. Chandler v. Ford* (8).

* * * * *

Cur. adv. vult.

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LORD DENMAN, Ch. J., in the ensuing vacation (December 3rd), delivered the judgment of the COURT :

This was an ejectment by a mortgagee of tolls of Staines Bridge, against the Commissioners, sued by their clerk. The plaintiff was not the first mortgagee, and was not empowered, as the second and other mortgagees are by the Turnpike Acts, to recover as a trustee for all. But the plaintiff relied on the ordinary principle that a lessor, or any grantor, cannot dispute with his lessee or grantee his own title to what he has assumed to convey. The application of this principle was denied in the present case, on account of the

(1) 4 B. & Ad. 137.

(2) 4 East, 230.

(3) 36 R. R. 563 (2 B. & Ad. 278).

(4) 2 B. & Ad. 518.

(5) 36 R. R. 656 (2 B. & Ad. 544).

(6) 36 R. R. 731 (2 B. & Ad. 744).

(7) 4 B. & Ad. 435, 436, 440.

(8) 3 Ad. & El. 649, 654.

public character of the defendant, whose counsel referred particularly to a *dictum* of ASHHURST, J. in a case of *Fairtitle d. Mytton v. Gilbert* (1). His Lordship concluded his judgment for the defendants, after holding them entitled on other grounds, in the following words: “Besides, there is a still further ground why the trustees should not be estopped; for this is a public Act of Parliament, and the Court are bound to take notice that the trustees under this Act had no power to mortgage the toll-houses. This deed therefore cannot operate in direct opposition to an Act of Parliament, which negatives the estoppel.”

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But that observation proceeded on the contents of the Act, presumed to be known to both the contracting parties, and to qualify any contract into which they might enter in execution of its powers. No such presumption can be made as to any party's knowledge of the fact that a previous mortgage had been made: and there is no authority for holding that trustees for a public purpose *are in any peculiar state of protection on such a point.

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The *dictum* of ASHHURST, J. is not adopted by either of the two Judges sitting with him, whose concurrence in the general result might be wholly independent of this doctrine.

The learned counsel for the defendant thought he could furnish the Court with some authorities, which, if produced, might have made further discussion proper. But the cases which he has since handed to the Court all appear to us to fall short of the object, and to be distinguishable from this case on obvious grounds, except one *dictum* of LITLEDALE, J. in a case reported in 4 Barnewall & Adolphus (2), which, upon reference, does not appear to raise this point.

We think, therefore, that the plaintiff is entitled to recover: and the rule will be discharged.

Rule discharged.

(1) 1 R. R. 455 (2 T. R. 171).

(2) *Doe d. Baggaley v. Hares*, 4 B. & Ad. 440.

1844.
April 25.

REG. v. THE JUSTICES OF THE PARTS OF KESTEVEN, LINCOLNSHIRE.

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(3 Q. B. 810—822; S. C. 1 P. & D. 113; 13 L. J. M. C. 78; Dav. & Mer. 113.)

The Court will not receive a case from Sessions which, in stating the points submitted, directs that, if the Court shall decide in one of the modes suggested, the case shall be sent back to the Sessions for final determination (1).

Where the Sessions, on appeal, decide, on a point preliminary to the whole case, or to the reception of a particular piece of evidence, that they will not hear the case farther, their decision is conclusive if the point involve matter of fact only; otherwise if it raise a point of practice which this Court can perceive to be matter of law. In the latter case, this Court will grant a *mandamus* to enter continuances and hear; in the former, not.

The question, whether an examination or statement of grounds of appeal give sufficient information to the opposite party is of the former kind. Therefore, where the grounds of appeal stated a settlement by apprenticeship in a third parish, but did not describe the house in which the residence took place, and the Sessions, on that objection, dismissed the appeal after hearing the respondents' case opened and one witness examined (the appellants not being heard except on the objection), this Court refused a *mandamus* to enter continuances and hear (2).

A RULE was obtained in last Michaelmas Term, calling on the justices of the parts of Kesteven, Lincolnshire, to show cause why a *mandamus* should not issue calling upon them to enter continuances and hear the appeal of the inhabitants of Great Ponton in the said parts of Kesteven against the after mentioned order of removal. The material statements on affidavit in support of the rule were as follows.

Two justices made an order for the removal of Miriam, the wife of William Welbourn, from the township of Spittlegate in the parts of Kesteven to the parish of Great Ponton in the same parts. The examinations stated a settlement of W. Welbourn in Great Ponton by apprenticeship to one John Green, and service and residence under it. Great Ponton gave notice of appeal, and stated, among other grounds, "That the said W. W., after his service with his said master the said John Green for part of the said term of the said apprenticeship, with the consent of his the said W. W.'s said master, to wit from May or June, 1833, to the end of the same term, served one Samuel Nowell of Grosvenor Wharf, Pimlico, *in the county of Middlesex, builder, under the said indenture in the said examinations respectively mentioned, in the parish of

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(1) Foll. Reg. v. Sutton Coldfield (1874) L. B. 8 Q. B. 153, 155, 43 L. J. M. C. 57; commented on, *Overseers of Walsall v. L. & N. W. Ry.* (1878) 4 App.

Ca. 30, 47, 48 L. J. M. C. 63.—A. C. (2) See now 12 & 13 Vict. c. 43, s. 8.—A. C.

Harlaxton in the said parts of Kesteven in the county of Lincoln, and inhabited and resided therein more than forty days during such service, being then single and unmarried and without child or children."

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The affidavit, by George Kewney, gentleman, attorney for the appellants, proceeded to state that the appeal came on for hearing at the Quarter Sessions held at Bourn, October, 1843, and that Thomas Manners, gentleman, the advocate for the respondents, having stated their case, called Charles Welbourn, the brother of William, "and proceeded to examine him as a witness in support of the said order; but, before he the said T. M. had completed the examination of the said C. W., this deponent objected to certain questions put by the said T. M., on the ground that such questions went to extract evidence of facts not stated in the said examinations; whereupon the said T. M. stated that, as a forty days' residence by the said W. W. in the said parish of Great Ponton with the said John Green under the said indenture was admitted by this deponent on behalf of the said appellants, he the said T. M. had an objection to make to the said statement of the grounds of the said appeal previous to this deponent entering into the case on behalf of the said appellants, which objection he the said T. M. would, as he considered it a fatal one, by the permission of the Court at once mention." "That, the said justices having consented thereto, he the said T. M. objected that it was incompetent for the said appellants to go into or to give any evidence in support of the settlement alleged by the said statement of the grounds of the said appeal to have been gained by the *said W. W. in the said parish of Har-

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laxton, inasmuch as the said statement of the grounds of the said appeal did not set forth the particular house in Harlaxton in which the said W. W. resided during the time he served under the said indenture in the said parish of Harlaxton as aforesaid, and did not specify or particularize the said house by the name of the landlord or in any other manner." That *Reg. v. The Justices of Suffolk* (1) was cited in support of the objection; and that the point was argued, the deponent contending that the objection was invalid: "but the said justices determined that in their opinion the said statement of the said grounds of appeal relating to the said alleged settlement in Harlaxton aforesaid was insufficient in particularity, because the house in which the said W. W. resided at H. aforesaid

(1) 6 Ad. & El. 109. The case referred to was probably *Reg. v. The Justices of the Eastern Division of Sussex*, 10 Ad. & El. 682.

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was not specified by the name of the landlord thereof or in any other manner, and that consequently they the said justices could not receive any evidence in support of such alleged settlement; and the said justices therefore confirmed the said order of removal, subject to the opinion of this honourable Court in manner following, that is to say, that, if this honourable Court should be of opinion that the said statement of the said grounds of appeal was insufficient in particularity as aforesaid, then the said order of removal to stand confirmed, but should this honourable Court be of a contrary opinion, that continuances should be entered, and the said justices should proceed to hear the said appeal. And this deponent further saith that he had one witness to give evidence of the service of the said W. W. under the said indenture with the said Samuel Nowell in the said parish *of Harlaxton, and the residence of the said W. W. therein for more than forty days during such service, and three other witnesses to give evidence in support of the case on behalf of the said appellants, in attendance at the said general Quarter Sessions" &c., "which witnesses he was prepared to call and should have called in case he had been allowed to do so by the said justices." The deponent added that, this Court having lately declared an intention not to receive cases from Quarter Sessions upon orders of removal, when so stated that the decision of this Court would not be final, the appellants, if such decision were adhered to, would be without remedy unless a *mandamus* were awarded, although they had good grounds of appeal on the merits; which merits they had been prevented from going into; and although the justices had granted a case believing that this Court would receive it, and intending that, if their own decision were erroneous, the appellants should have a remedy.

The affidavit of Mr. Manners, the advocate for the respondents, stated the proceedings at Sessions as follows. "That, he, this deponent, having stated his case on behalf of the said respondents, namely a service" &c. "and residence" &c. "under an indenture" &c., "the said George Kewney, as advocate for the said appellants, admitted a *prima facie* settlement in such parish, but contended that he should show a subsequent settlement in the parish of Harlaxton, as set forth in his statement of grounds of appeal; whereupon he, this deponent, as advocate for the said respondents, called Charles Welbourn the brother of the said W. Welbourn into the witness box, and proceeded to examine him

as to the apprentice W. W. having slept at his said master's house in the appellants' parish of Great Ponton the last *night of his said apprenticeship: and, upon the said G. Kewney, as advocate of the said appellants, objecting to certain questions put to such witness, as foreign to the evidence set forth in his sworn examination, he this deponent, by permission of the Court, took an objection to the grounds of appeal given by the appellants, as far as related to the alleged subsequent settlement intended to be set up in the parish of Harlaxton." The affidavit then set forth the argument upon the objection, and proceeded to state: "That, after hearing the advocates on both sides on the said objection so raised by this deponent to the said grounds of appeal, the Court of Quarter Sessions decided that the grounds of appeal were insufficient and defective, and confirmed the order." "That, after the Court had so confirmed the said order, the said justices, on the urgent application of the said George Kewney as advocate for the said appellants, granted a case" &c. The chairman of the Sessions also made affidavit, setting out the proceedings in nearly the same words. And the clerk of the peace gave, on affidavit, a copy of his minute of the order of Sessions, as follows:

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" *Great Ponton*, appellants. *Spittlegate*, respondents.

"Order of removal confirmed, subject to opinion of Court of Queen's Bench on case granted to appellants, on objection by respondents, 'That the statement of grounds of objection did not sufficiently set forth the residence and service of the husband of the pauper in the parish of Harlaxton, where subsequent settlement alleged.' If decided that grounds of objection sufficient in this respect, continuances to be entered, and the appeal to be reheard: otherwise the order to stand confirmed."

Mellor now showed cause:

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Where the Sessions have granted a case, this Court will not award a *mandamus* to enter continuances and hear, at the instance of the party who obtained the case, and has neglected to bring it up: *Reg. v. The Justices of the West Riding (Warmsworth v. Doncaster)* (1); *Rex v. The Justices of Suffolk* (2); *Rex v. The Justices of Northamptonshire* (3).

(1) 1 Ad. & El. 606.

(2) 6 Ad. & El. 109.

(3) 6 Ad. & El. 111, note (a).

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Whitehurst, *contra*, was called upon by the COURT as to this point:

It would have been useless to bring up the case, because this Court has declared that cases are not to be sent up in such a form that the decision here will not be final: *Reg. v. Wistow* (1); *Reg. v. Worth* (2); *Reg. v. Ickham* (3).

[*816] (PATTESON, J.: It does *not appear that you objected to the form, or applied to have the case drawn in a more correct one.

WIGHTMAN, J.: Why did not you abandon the case? You reserved the chance of proceeding on that if the Court would grant the indulgence.

LORD DENMAN, Ch. J.: We have not in all instances refused to hear cases stated in this manner.

1841.
May 10.

(1) REG. v. THE INHABITANTS OF
WISTOW.

The question at the end of the case sent by the Sessions (Kingston-upon-Hull, July, 1840) was stated as follows:

"If the Court shall be of opinion that the said service of the statement of the grounds of appeal was bad and insufficient, then the aforesaid order shall stand confirmed. But, if the Court shall be of a contrary opinion, then the appeal to stand respite until the general Quarter Sessions to be held for the said borough of Kingston-upon-Hull next after the judgment of the Court." The case now coming on in the Crown paper (before Lord Denman, Ch. J., Patteson, Williams, and Wightman, JJ.), Lord DENMAN, Ch. J. said: We cannot hear this case. A point is reserved for our opinion, and in the mean time the hearing respite to the next Sessions. We do not give opinions under such circumstances.

Archbold for the respondents.
Ruines for the appellants.

(2) Hil. T. 1843. The question there went up by the Sessions was, whether certain evidence was receivable: if this Court should hold that it was, the appeal was to go back for rehearing;

if the Court should think it not receivable, the order of removal to be quashed. This Court, however, heard and decided the case.

(3) REG. v. THE INHABITANTS OF
ICKHAM.

+ THE appellants relied on an indenture of apprenticeship: the respondents contended that it was invalid, not having *been enrolled pursuant to stat. 4 Geo. IV. c. 25, ss. 2, 4, and 6 Geo. IV. c. 107, s. 138. The Sessions (Kent, October, 1842), on this objection, confirmed the order without hearing further evidence, but granted a case, which stated that, if this Court should think that the omission to enrol prevented a settlement being gained, the order of Sessions was to be confirmed: if otherwise, the Court was to determine whether or not the case should be sent back to the Sessions to be heard. After argument by *Whateley*, *Deedes* and *Horn* in support of the order of Sessions,

LORD DENMAN, Ch. J. said:

We do not think it right that the Court should have a single question put to it in this manner; and in future

PATTESON, J.: Perhaps the same indulgence might have been shown here as in *Reg. v. Ickham* (1).)

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KESTEVEN.

In *Reg. v. Wistow* (2) the Court said they could not hear a case so stated. If the present case had been brought up, and the Court had thought the appellants right, they would have directed a further hearing. The effect of this rule, if the appellants succeed, will be the same.

Mellor was then desired to proceed in showing cause :

The Sessions have already heard. The question in such cases must always be whether or not the Court below has declined the exercise of jurisdiction in a matter within its competency. Here it has not. *Ex parte Broseley* (3), *where a *mandamus* was refused on that ground, is a similar case. * * *

[*817]

Whitehurst, contra :

[818]

Where the Sessions have decided on a mere preliminary objection, this Court will grant a *mandamus*. * * *

LORD DENMAN, Ch. J. :

[819]

Observations on that point cannot vary the question. It is satisfactory that we may now take it as universally known that, on cases sent from the Sessions, the Court of Queen's Bench will not decide merely for the purpose of putting the inferior Court in motion. To receive cases on which the Sessions only ask us whether they shall go forward or not is merely creating additional expense. On the other question before us we do not feel unmixed satisfaction, since it becomes necessary that we should overrule two cases. The decision in *Reg. v. The Justices of Carnarvonshire* (4) is clearly wrong; that in *Reg. v. The Justices of the West Riding* (5), if there be any distinction, still more wrong. In each of those cases the Court, perhaps led by the manner in which it was argued at the Bar, did, in effect, grant a new trial on the evidence. The language used by the Court in *Reg. v. The Justices of Carnarvonshire* (4) seems to explain the mistake. It was said there that, when

we shall not allow it. This case may be sent back to the Sessions.

WILLIAMS and COLERIDGE, JJ.
concurred.

*Starr, Espinasse, and Krane, for
the appellants, stand by.*

(1) *Ante*, p. 406, note (3).

(2) *Ante*, p. 406, note (1).

(3) 7 Ad. & El. 423.

(4) 2 Q. B. 325.

(5) 2 Q. B. 331.

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[*820]

the Sessions, on "a preliminary objection," which is invalid, refuse to hear, the Court will grant a *mandamus*. That is true, if the objection turn upon such a point of practice as the Court can see to be matter of law; if the Sessions have acted on a supposed rule which really is no rule. But, if, on a preliminary objection, they decide a matter of fact, we are bound by that decision. *The question as to the sufficiency of a notice of grounds of appeal in its statement of the facts on which the appellants mean to rely must be for the Sessions: we can form no opinion of it: and we have lately expressed ourselves to that effect when *Reg. v. The Justices of Carnarvonshire* (1) was under the consideration of the Court, and an attempt was made to distinguish it from the case then depending (2). Here no distinction can be drawn; and we are called upon to say whether or not our decision was right in *Reg. v. The Justices of Carnarvonshire* (1) and the other case referred to. I think it was not. This rule must be discharged.

PATTERSON, J.:

[*821]

If the Sessions thought there was doubt enough on the sufficiency of the grounds of appeal to warrant granting a case, they should have heard the appeal through, and granted a case subject to the question. I hope it will be understood, in future, that, if the Sessions are so satisfied that they think they ought to decide against the appellants or the respondents, they should not grant a case: but, if they have a doubt, they should hear the appeal through, and grant a case. I question whether *Mr. Whitehurst* is entitled to say here that he did not accept of a case. If it was offered in such a form as to be, in effect, no case, he should have remonstrated on that ground, and said that he did not ask for a case so stated: having failed to do so, he ought not to apply for a *mandamus*. Probably, however, the parties here were not aware of the rule we *have laid down respecting the statement of cases. As to the other point, I was not present at the decision in *Reg. v. The Justices of Carnarvonshire* (1); but *Reg. v. The Justices of the West Riding* (3) was still worse. And I hope it will be understood in future that, where the question is whether the examinations or notice give sufficient information to entitle parties to go into their case, that is for the determination of the Sessions.

(1) 2 Q. B. 325.

referred to.

(2) *Reg. v. Charlbury and Walcott*,

(3) 2 Q. B. 331.

3 Q. B. 378, is probably the case

WILLIAMS, J.:

One part of the decision in *Reg. v. The Justices of Carnarvonshire* (1) certainly turned on a misapplication of the terms “preliminary objection.” If the Sessions here had refused altogether to go into the case, the question would have been different: but it is clear, from the mode in which the appellants themselves put it, that this appeal was heard. If we held otherwise, it might be said that a case was not heard at the Sessions unless all the witnesses were heard; as if one were examined and four not. I think that this was a hearing and decision, and that the two cases are not distinguishable.

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KESTEVEN.

WIGHTMAN, J.:

I was present at the decision of *Reg. v. The Justices of Carnarvonshire* (1), though not at that of *Reg. v. The Justices of the West Riding* (2). Both turned on the view then taken of what constituted a preliminary objection. If the preliminary points had turned on mere matter of law and practice, the decisions might have been well grounded; but that was not so; and the same observation applies particularly to the *present case, where the Sessions clearly decided on a matter of fact and one touching the merits.

[*822]

Rule discharged.

Whitehurst then applied for leave to bring up the case as granted, but this was

Refused.

MILES v. BOUGH.

(3 Q. B. 845—872; S. C. 12 L. J. Q. B. 74; 3 G. & D. 119; 3 Ry. Cas. 668.)

An Act for building a bridge (11 Geo. IV. & 1 Will. IV. c. lxix., local and personal, public) created trustees, and provided that parties who agreed to give or lend money in aid of the trust should pay it to the treasurer of the trustees at such times and in such proportions as the trustees should order; and that, on neglect or refusal to pay, the trustees might sue for and recover the same, in the name of their treasurer, by action of debt or on the case: Held,

1. That debt or case might be brought, at the option of the trustees, on an agreement either to give or to lend.

2. That no party could be sued for nonpayment of a call till he had received due notice thereof, though the statute did not expressly require notice.

3. That an order by the trustees to pay the money at a given banker's, to the account of M., treasurer to the trustees, was a good call.

The Act provided that, where any notice was to be given by the trustees,

(1) 2 Q. B. 325.

(2) 2 Q. B. 331.

1842.
Nov. 21.
1844.
May 22.
[845]

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such notice should be in writing or in print, signed by three or more of the trustees or their clerk or clerks for the time being by their order: Held,

4. That it was sufficient for the declaration to state that the calls were made by order of the trustees, and that the defendant had due notice of the calls, to wit, by notice in writing, signed by the clerks of the trustees; and that it was no objection, at least after verdict, that the notice was not alleged to have been given by order of the trustees.

5. That a notice signed with the names of the clerks to the trustees, but signed in fact not by such clerks, but by a clerk employed by them, was insufficient; and that, where this appeared to be the only notice, the objection was not cured by an express promise to pay. But

6. That a jury might infer a good notice, ordered by the trustees and duly signed, from the fact of an express promise to pay, though it appeared in evidence that a bad notice had been sent to the defendant; if it did not appear by direct evidence that this was the only notice sent.

7. *Semble*, per COLERIDGE, J., that a signature by one of two joint clerks to the trustees, in the name of the two, was sufficient.

8. That an agreement to lend 25*l.* might be inferred from a written memorandum, signed by defendant, recognising an agreement to subscribe some money, coupled with an express promise to pay calls corresponding with a loan of 25*l.*, and actual payment, on a previous occasion, of a sum corresponding to a call, defendant at the same time taking a receipt expressed to be for a call on a loan of 25*l.* And that such evidence was not invalidated by sect. 4 of stat. 29 Car. II. c. 4, though a prospectus had been issued by the trustees before the agreement, showing that the whole sum would not be called for within a year, and though in fact it was not so called for.

The Act provided that the trustees should keep a book, and proper entries be made therein of the names of the trustees who should attend the meetings, and of all orders and proceedings made or taken relative to the execution of the Act; and that the chairman of every meeting of the trustees should subscribe his name at the end of the proceedings of the said trustees at such meeting; and all such books should be admitted as evidence in all Courts and upon all occasions whatsoever. In practice, the clerk of the trustees made up the entry of the proceedings in the book after the close of a meeting, and the chairman of that meeting used to sign the entry of the proceedings at some subsequent time: Held,

9. That the book in which the proceedings were so entered and signed was good evidence within the above provision.

10. But that the statute did not make such book the only evidence of the proceedings; and therefore an order of the trustees to give notice of calls might be inferred, as above (pl. 6) though not entered in the book, from the defendant's promise.

The statute required a pecuniary qualification in the trustees, and imposed a disqualification in case of being interested in contracts, or a licensed victualler, &c., and inflicted a penalty for acting without being qualified, or without taking the oath after mentioned, or if interested &c.: but it provided that all acts of persons acting as trustees, though not qualified, or being disqualified, previous to their being convicted of the offence, should be valid. It is then enacted that no person should be capable of acting as trustee (except in administering the oath), until he should have taken and subscribed an oath set out in the statute, which oath it should be lawful for any trustee to administer: and the oath so taken and subscribed by each trustee should be entered in the book of proceedings: Held,

11. That the acts of trustees who had not been sworn were not valid.

At the beginning of the book of proceedings the statutory form of oath

was copied out, with blanks for the names; and beneath this were the signatures of the several trustees, without date or other memorandum. In the subsequent minutes of proceedings at the several meetings were entries stating that the several trustees, whose names were subscribed to the oath, had been sworn at those meetings: Held,

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BOUGH.

12. That this was sufficient evidence of the trustees having been duly sworn.

DEBT by the treasurer of the trustees for the purposes of an Act of Parliament, &c. (11 Geo. IV. & 1 Will. IV. c. lxix., local and personal, public (1)), *being the nominal plaintiff for and on behalf of the trustees.

[*846]

(1) "For building a bridge across the river Avon, from Clifton in the county of Gloucester to the opposite side of the river in the county of *Somerset, and for making convenient roads and approaches to communicate therewith."

Sect. 1 recites a bequest made by William Vick of monies in trust to be laid out in building a bridge over the Avon from Clifton Down to Leigh Down, procuring the Act of Parliament, making compensation, &c.; that an alteration of the plan was desirable; that divers persons had subscribed, and others were willing to subscribe, money in aid of the trust, if such alteration were made, and that several persons had agreed to lend and advance certain sums, on condition of a toll being imposed till principal and interest should be repaid. It is then enacted that the fund, and all sums subscribed or to be subscribed, be vested in the Master of the Society for the time being of Merchant Adventurers in Bristol, the senior sheriff of Bristol for the time being, and Thomas Daniel, and their successors to be elected as after mentioned, discharged of the trusts of the will and upon the trusts thereafter declared.

Sects. 2 and 3 give power to the existing trustees to elect thirty-five new trustees.

Sect. 4 directs the supplying of vacancies in the number of trustees, by election to be made by the surviving and remaining trustees. "And every trustee who shall be so elected and appointed as aforesaid (having taken and subscribed the oath or affirma-

tion hereinafter directed, and being qualified in manner hereinafter mentioned,) shall have the same power and authority to act in the execution of this Act as was vested in the trustee in whose place or stead he shall have been elected and appointed as aforesaid."

[*846, *n.*]

Sect. 5 enacts: "That no person (except he shall be or become a trustee by virtue of his situation or office) shall be capable of being elected or appointed *a trustee, or of acting as a trustee under this Act, unless at the time of his election or appointment and acting he shall be seised or possessed," &c. (a pecuniary qualification was then set forth); "and if any such person hereby appointed or who shall be elected or appointed a trustee under this Act (except as aforesaid) shall act as such without being qualified as aforesaid, or without taking the oath or affirmation hereinafter mentioned, or shall act as a trustee relating to any matter or thing in which he shall be personally concerned or interested, or being a licensed victualler, or being concerned or interested in any contract relating to this Act, every such person shall for every such offence forfeit and pay the sum of 100*l.* to any person or persons who shall sue for the same, to be recovered, together with full costs of suit, in any of his Majesty's Courts" &c.; "Provided also, that all acts and proceedings of any person or persons acting as a trustee or trustees in the execution of this Act, though not duly qualified or being disqualified as aforesaid, previous to his or their being convicted of the said offence, shall,

[*847, *n.*]

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[*847]

The first count alleged that heretofore, to wit 1st *January, 1835, defendant agreed with the trustees to lend the sum of 25*l.* to the

notwithstanding such conviction, be as good, valid, and effectual as if such person or persons had been duly qualified and not disqualified to act as a trustee or trustees according to the directions of this Act."

Sect. 6. "Provided also, and be it further enacted, that no person shall be capable of acting as a trustee in the execution of this Act (except in administering the following oath or affirmation) until he shall have taken and subscribed an oath or affirmation in the form or to the effect following; (that is to say,)

" 'I A. B. do swear,' " &c. (the words of the oath were then set out,) "which oath or affirmation it shall be lawful for any one of the said trustees to administer, and he is hereby required to administer the same to any other of the said trustees; and the said oath or affirmation so taken and subscribed by each such trustee shall be entered in the book of proceedings of the said trustees to be kept by their clerk for the time being."

Sect. 11 enacts: (1) "That the said trustees shall cause to be provided and kept a proper book, and proper entries to be made therein of the names of the several trustees who shall attend the respective meetings, and of all orders and proceedings made or taken relative to the execution of this Act; and the chairman of every meeting of the said trustees shall subscribe his name at the end of the proceedings of the said trustees at such meeting; and all such books, and also all books kept for registering mortgages" &c., "shall be admitted as evidence in all Courts and upon all occasions *whatsoever; and all such books shall at all seasonable times be open to the inspection of the said trustees and of any creditor" &c.

Sect. 13 enacts: "That the said trustees shall and may, whenever they shall think proper, appoint and employ a treasurer or treasurers, clerk or

clerks, surveyor or surveyors, and such other officer or officers, person or persons, for the execution of this Act, or for any other matter or thing relating to the powers hereby vested in the said trustees, as they the said trustees shall think proper; and the said trustees shall and may from time to time remove them or any of them, and in like manner appoint others in the room of those removed."

Several clauses are then added, regulating the conduct of the Company, and giving them powers for carrying the purposes of the Act into effect.

Sect. 85 enacts: "That the several persons who have agreed to give or lend, or who shall hereafter agree to give or lend, any money towards carrying this Act into execution, and their several and respective heirs, executors, and administrators, shall and they are hereby required to pay the respective sums so agreed to be given or lent, or which shall hereafter be agreed to be given or lent, to the treasurer of the said trustees, at such times and in such parts and proportions as the said trustees shall order and direct; and if any person shall neglect or refuse to pay the same as aforesaid, it shall be lawful for the said trustees to sue for and recover the same in the name of their treasurer in any of his Majesty's Courts of record, by action of debt or on the case, or by bill, suit, or information, wherein no essoign, protection, wager of law, or more than one imparlance shall be allowed."

Sect. 109 enacts: "That in all cases where it may be necessary for any person to serve any notice or other proceeding upon the said trustees, service thereof respectively upon any one of the said trustees who may be a member of a committee for managing the affairs of the said trustees, or left at his last or usual place of abode, or upon the clerk or clerks of the said trustees, or left at the office of such

(1) Cf. Companies Clauses Act, 1845 (8 Vict. c. 16), s. 98.

said trustees towards carrying the said Act into execution; the said sum, with *interest thereon, to be secured and repaid to defendant in manner in and by the Act directed in that behalf: and thereupon, according to the said Act, defendant *then became and was liable to pay the sum so agreed to be lent to the treasurer of the trustees, at such times and in such parts and proportions as the trustees should order and direct; that afterwards, to wit on 20th November, 1837, a part, to wit 15 per cent., only, of the monies given and lent towards carrying the Act into execution having before then been called for by the trustees or paid by the persons who had respectively agreed to give or lend the said monies, the trustees, by their order then made, ordered and directed that ten per cent. should be paid by the persons who had agreed to give or lend money towards carrying the Act into execution, the same to be paid to plaintiff, then being the treasurer of the trustees, on or before 20th January, 1838; which day, at the commencement of this suit, had long elapsed; of which order of the trustees defendant, before the last mentioned day, to wit on 22nd November, 1837, and on divers days &c., had due notice, to wit by notice in writing signed by the then clerks of the trustees, and then left at the then usual place of abode of defendant; and defendant was then requested by the trustees to pay the amount by the said order directed to be paid, at the time and in manner in the *said order in that behalf mentioned: yet defendant has not paid the said amount, or any part thereof. Whereby, and by reason of the nonpayment &c., an action has accrued to plaintiff to demand and have from defendant 2*l.* 10*s.*, being ten per cent. &c.

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[*848]
[*849]

[*850]

clerk or clerks, or at his or their last or usual place of abode, shall be deemed sufficient service of the same upon the said trustees; and in all cases where it may be necessary for the said trustees to give any notice to any person or body whomsoever under the provisions of this Act, such notice shall be in writing or in print, and be signed by any three or more of the said trustees, or by the clerk or clerks for the time being to the said trustees by their order, and shall be delivered to such person, or left at his last or usual place of abode, or be *delivered to some member of such body, or left at his last or usual place of abode, or to some clerk or other officer of such body, or

left at the office of such clerk or other officer, or at his last or usual place of abode, except in cases in which any other mode of giving such respective notices is by this Act particularly directed; and in all cases where any public notice is by this Act directed to be given by the said trustees" (except where otherwise by this Act directed) "such notice shall be in writing or in print, and be signed by any three or more of the said trustees, or by the clerk or clerks to the said trustees for the time being, and be affixed" &c.; "and all such notices so published and given shall be good and available in law for all the purposes of this Act."

[*849, n.]

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2nd Count. That afterwards, to wit 15th October, 1838, 25 per cent. only having been called for and paid, the trustees ordered 10 per cent. to be paid to plaintiff on or before 19th January, 1839, of which defendant had notice on 16th October, 1838. The form of the count was in other respects like that of the first.

3rd Count. The same, *mutatis mutandis*, stating an order on 17th August, 1839, 35 per cent. only having been called for or paid, for 10 per cent., to be paid to plaintiff on or before 14th September, 1839: notice to defendant on 19th August, 1839.

4th Count. The same, stating an order on 16th November, 1839, 45 per cent. only having been called for or paid, for 20 per cent., to be paid to plaintiff on or before 20th January, 1840: notice to defendant on 18th November, 1839; whereby an action &c. for 5l.

5th Count. The same, stating an order on 6th August, 1840, 65 per cent. only having been called for or paid, for 20 per cent., to be paid on 14th September, 1840; notice to defendant on 8th August, 1840.

Pleas. 1. That defendant did not agree in manner &c.: conclusion to the country. Issue thereon.

2. That plaintiff was not, at the time of the commencement of this suit, the treasurer of the said trustees for the purposes of the Act, in manner &c.: conclusion to the country. Issue thereon.

3. That defendant had no notice of the respective orders of the trustees in the declaration mentioned, or *any or either of them, in manner &c.: conclusion to the country. Issue thereon.

4. A plea of fraud; which was traversed in the replication. Issue on the traverse.

5. This plea was demurred to. Joinder in demurrer.

6. That no such orders as in the declaration mentioned were, nor was any or either of them, made at a meeting of the trustees duly held in accordance with the directions of the Act, as in and by the said declaration &c.: conclusion to the country. Issue thereon.

7. That the trustees in the declaration mentioned were not, or was any or either of them, at the times of making the orders respectively, trustees or a trustee duly appointed and qualified according to the directions and within the true intent and meaning of the Act &c.: conclusion to the country. Issue thereon.

8. This plea was demurred to. Joinder in demurrer.

On the trial of the issues in fact, before Maule, J., at the Bristol Summer Assizes, 1841, for the purpose of proving the agreement

by defendant to lend the 25*l.*, a paper was put in, signed by defendant among others, in the summer of 1836, of which the following is a copy.

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“ CLIFTON SUSPENSION BRIDGE.

“ The undersigned having engaged to subscribe the several sums set against our respective names towards the erection of this bridge upon the terms that the additional sums subscribed shall amount to the sum of 17,000*l.*, and it appearing that upon this condition subscriptions to the amount of 9,000*l.* and upwards have *been obtained, we hereby agree (with the view to avoid the consequences of further delay, and in the expectation that, when the works shall have been commenced, further aid will more readily be obtained) to dispense with the condition above stated, and that the subscriptions we have made shall be, and be deemed to be, so made, subject only to and upon the terms of the Acts of Parliament passed for carrying the undertaking into effect.”

[*852]

The engagement referred to in this document was not produced, or its existence shown: and the only attempt made to prove the amount of the defendant's undertaking was proof of payment by him of a call earlier than those now sued for, which payment corresponded to 25*l.*; and that a receipt was given to him, expressed to be on a call on a loan of 25*l.* It appeared also that, before the above document was signed, a prospectus had issued which, as was contended for the defendant, showed that it was not intended to call for the sums till the expiration of more than a year. It was objected that, as the agreement was not to be performed within a year, a memorandum in writing was necessary under sect. 4 of the Statute of Frauds, 29 Car. II. c. 3; that the paper did not satisfy this requisite, not naming the sum; and that the defect could not be supplied by oral evidence. The learned Judge overruled this objection.

To prove the proceedings of the trustees, including the appointment of the treasurer, a book was produced as evidence under sect. 11 of the local Act. The book contained what purported to be the proceedings of the trustees at their several meetings; and the minutes of each meeting were signed with the name of *the chairman of such meeting. It appeared however, by parol evidence, that those signatures were not affixed at the time of or immediately upon the close of the several meetings; but that the course of proceeding was for the clerk, at some time after each meeting, to enter the

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minutes in the book, and for the chairman to call, at some subsequent time, at the office where the book was kept, and then to affix his signature. It was objected that this was not a compliance with sect. 11, and that the book was not evidence. The learned Judge overruled this objection.

To show that the trustees had been duly sworn, so as to entitle them to act, the following evidence was relied upon for the plaintiff. At the beginning of the book was a transcript of the form of oath set out in sect. 6, leaving blanks for the names. Below this were the signatures of the trustees who had acted, without any memorandum of the persons before whom they had taken the oath, or (with two or three exceptions) of the dates of the signatures. But the minutes of the several meetings contained entries, purporting that trustees, at different meetings, had taken the oath; and the names of these trustees corresponded with the signatures below the form of oath. The counsel for the defendant objected that this was not a sufficient proof of the swearing by the trustees; but the learned Judge held it to be sufficient.

The orders (except one(1)) were proved by the book: the following is the form of one of them, made 20th November, 1837.

[*854] “Ordered and directed, that *the sum of 10*l.* per cent. be paid by the several subscribers or persons who have agreed to give or lend money towards carrying the Act into execution, the same to be paid into the Bank of Messrs. Miles, Harford & Company on or before the 20th day of January next, to be placed to the account of Philip John Miles, Esq., treasurer of the trustees.” The other orders, so far as respects the present decision, were in the same form. The plaintiff was proved to have been appointed treasurer, and also to be a partner in the Bank of Miles, Harford & Co. It was objected for the defendant that the order should have been made to pay to the treasurer as such, and that the calls therefore were invalid. The learned Judge overruled this objection.

It was then proved that the following letter had been written to the defendant, before the commencement of the action.

“SIR,—Preparatory to taking legal proceedings against you for the recovery of the calls in arrear on your subscription of 25*l.* to the Clifton Suspension Bridge, we are desired, for the last time, to apply to you for the payment of such arrears, which amount to the sum of 17*l.* 10*s.*, and to inform you that, unless the same are

(1) The claim in respect of this was abandoned on the argument in banc.

paid into the Bank of Messrs. Miles, Harford & Co. of this city, to the credit of Philip John Miles, Esq., the treasurer of the trustees, on or before this day week, we shall lose no time afterwards in complying with the positive directions we have received to institute proceedings against you. Five of the calls made upon you are in arrear: and the subjoined statement will show the amount of each, and the times at which the same *were severally ordered by the trustees and became payable by you.

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“ We are, sir, your obedient Servants,

“ OSBORNE, WARD & Co.

“ Bristol, 30th November, 1840.

“ Mr. WILLIAM BOUGH.

Instalment.	Amount.	When made.	When payable.
3rd	10 <i>l.</i> per cent.	20th November, 1837	20th January, 1838
4th	10 <i>l.</i> per cent.	15th October, 1838	19th January, 1839
5th	10 <i>l.</i> per cent.	17th August, 1839	14th September, 1839
6th	20 <i>l.</i> per cent.	16th November, 1839	20th January, 1840
7th	20 <i>l.</i> per cent.	6th August, 1840	14th September, 1840

“ P.S.—You will be pleased to take notice that the trustees will expect you to pay interest on the arrears at the current rate from the date of this letter to the day of payment.”

It was shown that Messrs. Osborne and Ward were attorneys in partnership, who had been appointed clerks to the trustees; but their names were written, not by either of themselves, but by a clerk whom they, as attorneys, employed in their service. It was also proved that, after this notice had been given, the defendant had expressly promised to pay the three calls first mentioned in it. For the defendant it was objected that the action did not lie till notice of the calls had been given, and that the above notice, so signed, was insufficient under sect. 109. The learned Judge overruled this objection.

It was also objected for the defendant that the action was misconceived, and should have been brought in case, under sect. 85. The learned Judge overruled the objection, reserving leave to move for a nonsuit upon it, if the Court should consider that the question as to the form of action could be raised in this way.

Verdict for the plaintiff.

In Michaelmas Term, 1841, *Bompas*, Serjt. obtained a rule *nisi* for a nonsuit, or new trial, or reduction of damages.

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Erle and Butt now showed cause. * * *

Bompas, Serjt. and Manning, Serjt., contra. * * *

[862] LORD DENMAN, Ch. J. :

The first objection is as to the admissibility of the book which was produced in evidence. It is objected that the signature of the chairman of each meeting at which the proceedings took place was not affixed at such meeting, and that this is required by sect. 11. I think, on this point, we are bound by the decision of the Court of Common Pleas in *The Southampton Dock Company v. Richards* (1). I cannot distinguish the language of the Act which was the subject of decision there from that of the Act now before us: and it appears to me that, on such a point as this, authority and precedent should have great weight. Had we, indeed, decided otherwise on a former occasion, we might pause before we relinquished our own view. But *Reg. v. The Mayor of Evesham* (2) may admit of the distinction arising from the contrast between sect. 69 of stat. 5 & 6 Will. IV. c. 76, and sect. 11 of the present Act. The important distinction, however, is in the fact that in *Reg. v. The Mayor of Evesham* (2) both parties were in fault, and therefore, in our discretion, we did not issue a *mandamus*.

[*863] It is, secondly, objected that the trustees do not appear to have been sworn. As we are all of opinion that such a defect would not be cured by the clause at the end of sect. 5, which refers to the qualification only, we must consider whether such a defect does appear. Now it seems to me that the trustees clearly are sworn, and appear so to be by the book. The form of the oath, which is copied in the blank page of the book, is signed successively by all the trustees; and, from time to time, entries are made, in the proceedings of the several meetings, showing what trustees were sworn at the several times, and what others were present. There can be no reasonable doubt that there is, on the whole, a proper record of the oaths.

Thirdly, it is objected that there has been no proper call, because the orders direct that the sums shall be paid into the Bank to be placed to the account of the treasurer, not stating that they are to be paid to him as treasurer. But, as the order states him to be treasurer, it does, I think, sufficiently indicate in what character he is to have the money paid to him. The mode of the payment is

(1) 56 R. R. 436 (1 Man. & G. 448).

(2) 8 Ad. & El. 206.

designated: and, as for any liability to abuse, it seems to me that an actual payment into the hands of the treasurer would be subject to still greater risk.

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The fourth objection is, that no notice of calls has been given by three or more trustees, or by the clerk or clerks for the time being to the trustees, by their order, as required by sect. 109. The persons who are called on to pay money have a right to know that the call is made by the proper authority. That is the object of sect. 109. Now, the notice is not signed by any trustees, or by any clerk or clerks appointed by the trustees, but by some person whom the clerks to the trustees, in their character of attorneys, have in their service. If there was in fact any notice *of the order of the trustees, that might have been shown by a very little evidence. On this ground, therefore, there must be a new trial. It is suggested that the defendant has waived this difficulty by his express promise. Now, when we do not know the facts, an express promise may enable us to infer that what is right has been done: but, when we do know the facts, and they are insufficient, the promise does not make them sufficient.

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The objection on the want of a written agreement was given up in argument.

Then, as to the form of action. Whether a rule to enter a nonsuit be the proper way of raising this question, I do not think it necessary to inquire. I rather agree with my brother *Manning* that the question may be raised in this way, because the plaintiff may be supposed to withdraw himself from the trial if the action be misconceived. But I need not determine as to this point, because I think the legal objection is invalid. I have no doubt that the meaning of sect. 85 is, that debt or case may be brought at the will of the Company: the words "as the case may be" are not inserted. They would probably bring tort where they wanted to recover for consequential damage. I admit that there is a difficulty in making a man debtor on the ground that he has agreed to lend: but the Act removes the difficulty by giving the right of action.

WILLIAMS, J.:

I agree in what my Lord has said, as to the inference to be drawn from a promise where the fact itself is known, which is supposed to have been the ground of the promise.

As to the point on which there has been the most *discussion, I do

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not propose to enter into it, because I shall decide expressly on the authority of *The Southampton Dock Company v. Richards* (1). An opinion pronounced in one Court must always be a reason for adopting the same opinion in another: and I cannot distinguish that case from the present; indeed, I think the case in the Common Pleas the stronger of the two: for there the words in the Act were “shall be signed by the chairman at each respective meeting.”

Then, though it be true that we have here no jurat, showing that an oath was administered to any trustee by another trustee, yet we have, first, the signatures at the foot of the oath, which is set forth as given by the statute; and, next, we have, in the regular entry of the proceedings, a statement that the persons so signing in fact took the oaths. From this we are entitled to presume that all things were *ritè acta*.

I do not think that we are called on to say whether the question as to the form of action can be properly determined on motion for a nonsuit; for it seems to me that debt does lie. It is true that the statutory agreement is not, in itself, a statement of a debt; but can we say that it may not assume the character of a debt from the express enactment in sect. 85? I do not accede to the argument, that the words must be applied in different instances *secundum subjectam materiam*; the statute expressly gives the option.

COLERIDGE, J. :

The evidence as to the swearing in of the trustees, as I understand it, appears to me sufficient. I think it quite immaterial that the signature beneath the oath occurs in one page of the book, and *the entry of the fact, as part of the proceedings, in another. It is objected that the subscription does not show that the oath was administered by a person properly qualified; but we must assume that, in fact, it was duly administered, that is, by a trustee.

As to the order to pay: it seems that sect. 85 requires payment to be made to the treasurer, and that the order requires payment to be made into a Bank, “to be placed to the account of Philip John Miles, Esq., treasurer.” Now suppose the plaintiff to be, not a partner in the Bank, but a stranger. Still we must presume that the ordinary course would be pursued at the Bank; and that the account would be headed, “Philip John Miles, Treasurer of” &c. It is said that the Bank might place the money to the plaintiff’s general account: that, indeed, would not be a payment under the

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Act; but I do not agree that this could be done according to the terms of the notice.

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Then, as to the objection, which lies at the root of all, to the admissibility of the book in evidence. After much doubt, I have come to the same conclusion with the rest of the Court, and on the same grounds. It would be very mischievous that, on such a point, two of the Courts should give conflicting decisions. This clause occurs in many statutes; and it must be acted upon by magistrates, trustees and numerous other parties. I think therefore that, whatever we might say if this were *res integra*, we ought to consider ourselves bound by the decision of the other Court, unless we see a clear distinction between the cases, or feel ourselves authorised to say that the Court of Common Pleas are undoubtedly wrong. I am not prepared to say that they are wrong. I have certainly a doubt as to the *meaning of the words "at such meeting." My brother *Bompas* says that, if we do not require the signature to be made at the meeting at which the proceedings took place, the words have no meaning. It seems to me that, whatever be the meaning of the words, you have the same difficulty. If the signature may be made at a distinct time, you must suppose that the words do not confine in this respect: and, if it must be made immediately upon the close of the meeting, you still must interpret these words in the same way. It has been argued that our previous decision in *Reg. v. The Mayor of Evesham* (1) is inconsistent with the decision in the Common Pleas. Perhaps, in absolute strictness, the two are not quite reconcileable. And, if we thought our own decision the better of the two, and could not make the two consistent, I agree that we ought not to give way from false delicacy. But it is to be recollected that, on an application for a *mandamus*, many points come under the consideration of the Court, by which they regulate the exercise of their discretion: and, when we look at all the circumstances of *Reg. v. The Mayor of Evesham* (1), we find that the objection to granting the *mandamus* was not exclusively grounded on the fact that the minutes were not signed at the meeting at which the proceedings took place. We looked at all that had taken place, and, upon considering all the circumstances, refused the *mandamus*. It seems to me, therefore, that we may consistently adhere to the decision of the Common Pleas, and that we ought to do so.

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Then as to the lesser point, the sufficiency of the notice. It is true that sect. 85, which authorises the making of the calls, does

(1) 8 Ad. & El. 266.

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[*868]

not expressly require a notice. *Still, where an action is given only if the party "shall neglect or refuse to pay," I cannot but think that both reason and justice require that the party should have notice. A strong case was put by my brother *Manning*; a party may not be resident, and, without notice, may have no means of knowing that he has to make any payment. Then does the notice which has been given satisfy the requisites of sect. 109? Is it signed by three trustees, or the clerk or clerks of the trustees by their order? The section says that, if the trustees do not choose to sign, they may order their clerk or clerks to do so. It is not in the nature of a general authority: the clerk is substituted specifically for the trustees. Now here the names of "*Osborne and Ward*" are written by the clerk whom these gentlemen, in their general character of attorneys, employ. That is an attempt to substitute, for a deputy, his deputy. Whether what has taken place as to the three calls be a waiver of this objection is a point upon which I feel much doubt; but, as my Lord and my brother *WILLIAMS* entertain a clear opinion that it is not, my doubt ought to have no weight.

As to the form of action, I should rather have thought case the more proper remedy. That however is unimportant, on two grounds. First, the Legislature may have meant to give a pure discretion, without reference to the particular nature of the agreement, meaning that a party who agreed either to give or lend should be liable to either form of action, without restriction to one or the other "as the case may be." The words of the enactment seem to be used without much reference to the case which may arise. But, further, though I do not mean to say that the objection, if valid, is one which cannot be ground of nonsuit, it appears that my brother *MAULE* has not reserved leave to move for a nonsuit [*869] *absolutely, but only if we shall think the case to be open to a nonsuit under these circumstances. Now the objection is on the record; so that it is not necessary to decide upon it on motion for a nonsuit (1).

Rule absolute for a new trial.

1843.

The second trial took place before Coleridge, J., at the Bristol Summer Assizes, 1843. The points which arose, so far as is material to the following decision (2), were two. The plaintiff

(1) *Wightman, J.*, was absent.

(2) It was proposed to raise questions

on other points by a bill of excep-

tions.

confined his evidence to the three calls first mentioned, *ante*, p. 417. As to those, he proved that the defendant had expressly promised to pay them. The notice of the calls set out *ante*, p. 416, was not produced; but a notice signed “Osborne and Ward” was put in by the defendant; and it was shown that this notice was written by a clerk whom they employed in their character of attorneys; that Mr. Osborne managed the business of the trust, and that Mr. Ward was not in the habit of signing notices of calls. No evidence was given of an express order by the trustees to give the notice, though the book of proceedings was produced for other parts of the case. The learned Judge told the jury that a signature of the notice by one clerk to the trustees, in the name of both, was valid; and that they might infer a due notice, and an order by the trustees to give such notice, as to the three calls, from the fact of the promise. Verdict for the plaintiff, for the amount of the three calls.

MILES
BOUGH.

In Michaelmas Term, 1843, *Bompas*, Serjt. obtained a rule for a new trial on the ground of misdirection, or for arresting judgment, because the declaration did not aver that the trustees had ordered notice to be given of the calls. In the following Trinity Term (1),

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Butt and *Carrow* showed cause. * * *
Manning, Serjt., *contra*. * * *

1844.

LORD DENMAN, Ch. J. :

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As to the motion in arrest of judgment, it seems to me that the statement in the declaration is sufficient. The order to pay is alleged to have been made by the trustees; and it is alleged that notice of such order was given to the defendant.

Then, as to the proof of due notice, the defendant seems to me to have furnished it against himself, by promising to make the payments. It is said that he might not have known the facts; but against a party who makes a promise it may be assumed that he has knowledge of such facts as give validity to the promise. It is objected that the book ought to be produced showing such an order; but the order might be given without a formal entry in writing; and sect. 11 does not make the book the only evidence. Then, as to the signature of the notice, I think there was sufficient evidence of a due signature. The plaintiff says, “I charge the defendant with having received a notice duly signed: he might

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(1) May 22nd, 1844.

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v.
BOUGH.

have received other notices unduly signed : but, as he has promised, I call on the jury to infer that he must have received a good notice." In that I can see nothing irrational.

PATTESON, J. :

I think the objection, that the record wants an averment of the notice having been given by order of the trustees, could not prevail upon demurrer. I am clearly of opinion that it cannot prevail after verdict. The declaration states the calls to have been made by order of the trustees, and notice of those calls to have been given to the defendant.

As to the evidence, I agree with my Lord that sect. 11 does not enact that no evidence shall be given of the orders except by the contents of the book. And, lastly, I think the promise was sufficient to raise a presumption of due notice having been given. It is argued that the promise only shows some notice given, but not that it was due notice, as the declaration avers. That is a distinction which I never heard taken before.

WILLIAMS and COLERIDGE, JJ. concurred.

Rule discharged (1).

1843.
Nov. 28.
[873]

THE WEST LONDON RAILWAY COMPANY v. BERNARD.

(3 Q. B. 873—878; S. C. 13 L. J. Q. B. 68; D. & M. 397; 3 Ry. Cas. 649.)

By statute (6 & 7 Will. IV. c. lxxix.) incorporating a Railway Company. it was enacted that the proceedings of all meetings of the Company should be entered in a book, and "signed by the chairman of such respective meetings;" and that the proceedings, so entered and signed, should be deemed originals, and allowed to be read in evidence, &c.

Held, that the chairman who presided when the proceedings took place might sign such entry at the next meeting.

Resolutions of a meeting on August 18th, being entered in the book, were subscribed at the next meeting as follows. "Confirmed, 24th August, 1836. W. G." W. G. was chairman of both meetings. Held, a good signature of the proceedings of August 18th.

DEBT against defendant as a subscriber to a certain undertaking for making and maintaining a railway to be called the Birmingham, Bristol, and Thames Junction Railway (2). The action was for

(1) See the next case.

called the West London Railway Company.

(2) The undertakers were afterwards

calls. Plea 7. That no such calls or call as in the declaration mentioned were or was ever made in manner and form, &c. : conclusion to the country. Issue thereon.

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On the trial, before Lord Abinger, C. B., at the Surrey Assizes, July, 1842, it appeared that the Company (1) was incorporated by stat. 6 & 7 Will.IV. c. lxxix., local and personal, public, "for making a railway from the basin of the Kensington Canal at Kensington to join the London and Birmingham and Great Western Railways at or near Holsden Green in the county of Middlesex, and to be called" &c. By that statute, sect. 118 (2), it is enacted "That the orders and proceedings of all meetings, as well general as special, of the said Company, and of the said directors and committees respectively, shall be entered in some book or books to be provided and kept for that purpose, and shall be signed by the chairman of such respective meetings; and such orders *and proceedings, when so entered and signed, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all Courts, and before all Judges, justices, and others, and that without due proof of such respective meetings having been duly convened, or of the persons making or entering such orders or proceedings being proprietors or being directors or members of the committee, or of the signature of such chairman, as the case may be, all of which last-mentioned acts shall be presumed."

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To prove the authority for making the calls, the plaintiffs produced the book kept according to sect. 118. It contained an entry dated August 18th, 1836, and headed "Minutes of meeting," &c. : after which came resolutions of the meeting; one of them being as follows :

"Resolved that a call of 2*l.* per share be made upon the proprietors, payable at " &c. "on " &c.

Under this entry was written, in a different hand, "Confirmed, 24th August, 1836. W. GUNSTON." Gunston appeared by the former minute to have been the chairman on the 18th, and he was also chairman on the 24th, when the next meeting took place (3). There were other entries of resolutions to make calls, confirmed in the same form. The defendant's counsel objected that such an entry was no evidence of the resolution of a meeting signed by the

(1) The undertakers were afterwards called the West London Railway Company.

(8 Vict. c. 16), s. 98.

(3) On the argument in Banc, the book itself was produced, and the contents appeared as here stated.

(2) Cf. Comp. Clauses Act, 1845

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chairman of such meeting, within sect. 118 ; that the minutes themselves were not signed at all ; and that the party who signed the confirmation did so at a period long subsequent to the meeting at which the resolution was made, and as chairman of a different meeting. The LORD *CHIEF BARON received the evidence, but reserved leave to move to enter a nonsuit on another point ; and the plaintiffs had a verdict.

In Michaelmas Term, 1842, *Channell*, Serjt., obtained a *nisi* for a nonsuit on the point reserved (1) ; or for a new trial on account of the improper reception of the above evidence.

Thesiger and *E. James* now showed cause :

The Southampton Dock Company v. Richards (2) decides this point. The words of the local Act there (" shall be signed by the chairman at each respective meeting ") were less favourable to the validity of the minute than the words used here. In *The London and Brighton Railway Company v. Fairclough* (3), where the local Act required the minutes of meetings to be signed " by the chairman of such respective meetings," and the signature was added as in the present case, the first cited decision was admitted to be conclusive. In a later case in this Court, *Miles v. Bough* (4), *Reg. v. The Mayor of Evesham* (5) was cited as conflicting with the first of these authorities, but the decision was in accordance with them ; and *Reg. v. The Mayor of Evesham* (6) was in fact a very different case. There a draft of the minutes had been made, and taken away from the place of meeting, and a copy only returned.

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(LORD DENMAN, Ch. J.: There *was some reasonable doubt whether the minute returned was quite the same thing.)

And the point arose on motion for a *mandamus*, which LORD DENMAN, Ch. J. noticed as a distinction in *Miles v. Bough* (6). PATTESON, J. said, in *Reg. v. The Mayor of Evesham* (7), " The words of the Act " (5 & 6 Will. IV. c. 76, s. 69) " imply that the minutes shall be drawn up at the time of the meeting, and signed at

(1) This was ultimately decided on the authority of the last ruling (pp. 638—640), in *The London Grand Junction Railway Company v. Freeman*, 2 Man. & G. 606, which, as to the point in question, was held not materially distinguishable from the present case. No further notice of

this point is deemed necessary.

(2) 56 R. R. 436 (1 Man. & G. 448).

(3) 58 R. R. 520 (2 Man. & G. 674).

(4) *Ante*, p. 409.

(5) 8 Ad. & El. 266.

(6) *Ante*, p. 418.

(7) 8 Ad. & El. 271.

that time. It may be inconvenient ; and perhaps, if the town clerk had drawn up the minutes, and had them signed, after the meeting, we might not say that the thing was incorrect when so done. But we cannot order a thing to be done in an irregular manner." That is all that was decided. It will scarcely be insisted, on the present argument, that the time of signing is material : and, as to the mode, it is true that the chairman did not sign at the foot of the resolutions themselves ; but he signed a confirmation which embodied them, and so, substantially at least, complied with the statute.

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Bompas and Channell, Serjts., contra :

The intention of the Act was that the entry of proceedings should be vouched by the signature of a person present. The case in the Common Pleas, recognized by this Court in *Miles v. Bough* (1), must be acceded to : but it is going far to say that the minutes of a meeting may be signed by the chairman of a subsequent one.

(LORD DENMAN, Ch. J. : He is not less the " chairman of " the former meeting, because he presides at the next. I think it would be better that the chairman should sign at the meeting where the proceedings take place, because, *otherwise, if a different chairman presides at the next, they may go for nothing. But we must abide by the decided case.)

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This goes farther. The party here signs, not as the chairman of the former meeting, but as chairman of a subsequent one who by their resolution confirm it ; and he does not sign the former resolutions any otherwise than by subscribing the resolution to confirm ; which is, in fact, no signing of the previous minute. In the cases referred to, where signature at a subsequent meeting has been held sufficient, the objection was raised by extrinsic evidence, the minute on the face of it showing no irregularity. Here the document does not even purport to be signed conformably with the statute.

(A third point was discussed ; but the Court thought it had not been sufficiently raised at the trial, and therefore gave no judgment on it.)

LORD DENMAN, Ch. J. :

The Southampton Dock Company v. Richards (2) is now admitted

(1) *Ante*, p. 418.

(2) 56 R. R. 436 (1 Man. & G. 448).

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to be the ruling case on this subject. The minutes of August 18th might therefore be signed by the chairman of that day's meeting on August 24th. The words "confirmed, 24th August" cannot do away with the signature of the chairman, which is subscribed, and is all that the statute requires.

PATTESON, J. :

It is contended that the signature following the words "confirmed, 24th August" is only a signature of the confirmation, not of the minute itself. If so, this book has not a signed minute from beginning to end. But there is nothing in the objection, the signature *on the 24th being by the same person who presided on the 18th.

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WILLIAMS, J. :

Signature of the minutes by the chairman, when presiding at a subsequent meeting, has been held sufficient; and there is no distinction which prevents our deciding so in this case.

COLERIDGE, J. :

These minutes are subscribed by the person who was chairman when the proceedings took place. The signature is none the worse, because he signs as chairman of a subsequent meeting.

Rule discharged.

1842.
Nov. 22.

[878]

IN THE MATTER OF ARBITRATION BETWEEN MARSHALL
AND OTHERS, AND DRESSER, PUBLIC OFFICER, &c.

(3 Q. B. 878—884; S. C. 12 L. J. Q. B. 104; 3 G. & D. 253.)

An agreement of reference, between M. and D., recited a dispute relating to a transaction under which five bills of exchange were drawn upon and accepted by P. : and, as to the nature and circumstances of, or attending, such transaction and bills, it was agreed that the same, and all matters in question touching and concerning or in any wise relating thereto, should be referred to arbitration. The arbitrator awarded that the bills, and all moneys thereby secured, were the property of M. ; and that the said bills and moneys, and all proceeds thereof, should be delivered and paid to M. ; and that, in case D. should have received any part of the money secured by and mentioned in the bills, he should pay it to M. The award was silent as to damages.

M. moved to set aside the award, as not final, and for giving no damages, on affidavit that at the hearing it was shown that the bills had been delivered to D., and it was understood that D. had received the whole amount from the acceptor, and therefore no evidence was offered on that head on either side. The affidavits in answer denied such understanding,

and such receipt of proceeds; and stated that, on the hearing, no allegation of such receipt had been made, nor any claim in respect thereof, and that no question as to such receipt had been made a matter of difference at the arbitration, but that M. had there contended that D. was bound to pay the whole amount, whether he had received any thing or not.

In re
MARSHALL.

Quere, whether the affidavits could be taken into consideration upon this motion? But (assuming that they could, and that the receipt of proceeds appeared by them not to have been a matter in difference on the arbitration),

Held, that it appeared that the arbitrator had considered the two questions as mixed up together; that one part of the award could therefore not be separated from the other; and that the whole was bad as not being final.

By agreement, dated 29th December, 1841, between Henry Cooper Marshall, Moses Atkinson and Joseph Robert William Atkinson, assignees of Thomas *Winmore Wilson, of the one part, and Henry Dresser, general manager and public officer of the Yorkshire District Bank, of the other part, it was recited that divers disputes between the assignees and the Bank, relating to the several accounts, transactions and dealings between the bankrupt and the Bank and other persons, had been amicably adjusted, as far as respected the parties to the agreement, save and except one relating to a certain transaction or dealing for a large quantity of yarn, delivered by the said T. W. Wilson to Edward Parker, for which five bills of exchange, for 1,000*l.* each, were drawn by the bankrupt upon, and accepted by, E. Parker: and, as to the nature and circumstances of, and attending, such transaction or dealing and bills, it was agreed that the same, and all matters in question touching and concerning or in anywise relating thereto, should be referred to two arbitrators, with power to appoint an umpire.

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The agreement was set out in the affidavit upon which the rule hereinafter mentioned was obtained; and it was further stated that the arbitrators appointed an umpire, and a meeting was held before the arbitrators and umpire, which was attended by the attorneys respectively of the assignees and the Bank, when evidence was produced, on behalf of the assignees, that the bills were given by Wilson to the Bank under circumstances which were set forth in the affidavit for the purpose of showing that the Bank was not entitled to retain the bills. The affidavit further stated that, at the hearing, it was understood and believed that the Bank had received the whole amount of the bills from the acceptor; that, therefore, no evidence was *offered on behalf of the assignees on that head; that such assumption was not denied, nor any evidence offered to the contrary, on behalf of the Bank;

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MARSHALL.

and that it was insisted, on behalf of the assignees, that the Bank were bound to pay the assignees the whole amount with interest.

That the umpire afterwards made his award, whereby he "did award, adjudge and determine: That the said several bills of exchange, amounting to the said sum of 5,000*l.*, and all the moneys thereby respectively secured, were the right, title and property of the said Henry Cooper Marshall," &c., "as such assignees as aforesaid; and that the said bills and moneys, and all proceeds thereof, should be forthwith delivered and paid to the said Henry Cooper Marshall," &c., "accordingly; and that, in case the said Banking Company, or any person or persons on their behalf, and for their use and account, should have received the whole or any part of the money secured and mentioned in the said respective bills of exchange, or any of them, the said Banking Company should pay, or cause to be paid, to the said Henry Cooper Marshall," &c., "as such assignees," "interest on the said respective moneys at and after the rate of 3*l.* per centum per annum, to be computed from the respective times when such moneys should or might have been received by or on the behalf or for the use of the said Banking Company, and until the actual payment thereof to the said assignees."

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The affidavit stated that it was now alleged by the Bank that they had received no part of the money on the bills: but the deponent said that, if the Bank had used due diligence, the whole might have been received from the acceptor; and he believed the Bank had received *a large amount. That the acceptor was now wholly unable to pay; and that, by reason of the Bank wrongfully withholding the bills, the same had become of little or no value, and the money was likely to be lost to the bankrupt's estate.

W. H. Watson, on behalf of the assignees, obtained a rule, in last Term, for setting aside the award, on the grounds, "that the said award is uncertain, and not final, in not finding how much has been received by the said Banking Company on the bills mentioned in the said award, and whether the said bills mentioned in the said award are paid in all or in part; and the arbitrator ought to have awarded a specific sum for damages for the detention of the said bills; and that the umpire has not determined all matters submitted to him, viz., in not finding any damages or amount payable to the assignees in respect of the said bills, or the detention thereof."

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The affidavits in answer denied some of the statements on the other side, as to the evidence given of the circumstances under which the bills were received, and also denied that it was understood, believed or stated that any money had been received for the bills; and alleged that it was stated, on behalf of the Bank, and was the fact, that nothing had been received; but that it was contended, on behalf of the assignees, that, although the Bank might not have received any thing, it was bound to pay the whole. That the Bank “was not charged, on the hearing of the said arbitration, with having received any money on account of the said bills; nor was it ever understood or suggested, at the hearing before the said arbitrators and umpire or any of them, nor was *it at any time in any way before the making of the said award suggested, assumed or asserted, that the said Bank, copartnership, or any person or persons on their behalf and for their use and account, had received the whole or any part of the moneys secured and mentioned in the said respective bills of exchange, or any of them.” That no inquiry or question respecting any receipt of moneys by or on behalf of the said Bank in respect of the said bills, or any or either of them, or any part thereof, was in any way made or put before the said arbitrators and umpire, or any or either of them, at any time before the making of the award, as a question in difference between the parties to the said arbitration. “That, as no assertion, suggestion, inquiry or question was made before or put to the said arbitrators or umpire respecting such receipt of money on account of the said bills of exchange as aforesaid, it did not occur to the said Bank” to give “any evidence of such nonpayment of the said bills.” That the Bank had, since the award, tendered the bills to the assignees, who had refused to accept them.

[*882]

T. F. Ellis now showed cause:

The finding of the arbitrator is not final as to the receipt of the proceeds of the bills: and, if the arbitrator had been bound, or entitled, to inquire into this matter, of course the award could not have been sustained: *Pedley v. Goddard* (1). But the affidavits show that this was not a matter in difference before him.

(LORD DENMAN, Ch. J.: Can we look into the affidavits for the purpose of upholding an award bad on its face?)

The award is not bad except *upon the assumption that the

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(1) 4 R. R. 382 (7 T. R. 73).

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arbitrator had the matter before him; and that is a question which can be determined only upon affidavit, unless the submission expressly include the matter, which will not be pretended. The question is, whether the arbitrator had power to enter upon the inquiry at all (1). Now here, if the arbitrator had found the fact that the Bank had received the proceeds of the bills, and if he had ordered such proceeds to be paid over to the assignees, the Bank, on the one hand, might have refused performance of so much of the award, and, on the other hand, the award could not have been set aside *in toto*, but would merely have been bad as to the part relating to the proceeds, for excess of jurisdiction.

(COLERIDGE, J.: That is, unless the disputed part of the award be inseparably mixed up with the part relating to that which is within the arbitrator's jurisdiction (2).)

That is not the case here: the question, who is entitled to the bills, is perfectly distinct from the question what use has been made of them by the party not entitled. The latter might have been made a matter in difference, but was not.

(LORD DENMAN, Ch. J.: Two cases rather appear to favour your view: *Aitchison v. Cargey* (3) and *Manser v. Hearer* (4).)

As to the damages, the silence of the arbitrator is equivalent to a finding that there are none: *Dunn v. Warlters* (5).

R. V. Richards (with whom was *W. H. Watson*), *contra* :

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All matters relating to the bills have been referred *to the arbitrator. Supposing the Court to assume from the affidavits that no question as to the proceeds was raised before him, still the award shows that he has mixed up the two questions. Then it is admitted that the award is bad as to the proceeds.

(He was here stopped by the COURT.)

LORD DENMAN, Ch. J. :

We are satisfied that we cannot hold this to be mere excess of

(1) See *Reg. v. Bolton*, 55 R. R. 20 2 Bing. 199, in error; *S. C.* in B. R. (1 Q. B. 66). *Cargey v. Aitchison*, 2 B. & C. 170; see judgment of BEST, J.

(2) See *Tomlin v. The Mayor of Fordwich*, 44 R. R. 382 (5 Ad. & El. 147).

(4) 37 R. R. 426 (3 B. & Ad. 295).
(5) 60 R. R. 733 (9 M. & W. 293).

(3) 26 R. R. 305 (13 Price, 639, and

jurisdiction. The case is not like *Manser v. Heaven* (1), where the bad part of the award could be separated from the other. I think the question as to the proceeds was the very matter referred: at all events the arbitrator, professing to act upon what he considers submitted to him, makes an award on the whole, which will not bind the parties to the submission.

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WILLIAMS, J. concurred.

COLERIDGE, J.:

At first, I was much struck with the argument that the bad finding was merely as to a matter in respect of which the arbitrator had exceeded his power: but there is a twofold answer. The first is that which *Mr. Richards* has given. How can we tell that the arbitrator's view as to the proceeds has not affected his determination as to the other matters? Secondly, I think the affidavits themselves leave it in doubt whether this was not made a matter in difference: and this shows the inconvenience of looking at affidavits on such a question (2).

Rule absolute.

REG. v. THE INHABITANTS OF PEMBRIDGE.

(3 Q. B. 901—907; S. C. 12 L. J. Q. B. 47; 3 G. & D. 5; 6 Jur. 1037.)

Under the Highway Act, 1835 (5 & 6 Will. IV. c. 50), s. 98, if an indictment for non-repair of a highway is found at the Assizes and removed by *certiorari*, the Judge who tries the cause at Nisi Prius has power to certify that the defence is frivolous and to award costs.

The Juries Act, 1825 (6 Geo. IV. c. 50), s. 34, authorizing the Judge "before whom the cause is tried" to certify for the costs of a special jury, applies to criminal cases.

THIS was an indictment for non-repair of a highway. The bill was found at the Spring Assizes, 1841, and removed into this Court by *certiorari*, by the prosecutor. On the trial, before Coleridge, J., at the Summer Assizes for Herefordshire, 1841, a verdict was found for the Crown. The learned Judge certified that the defence appeared to him frivolous, and awarded costs, and also certified, by a separate certificate, that the case was fit to be tried by a special jury. A side-bar rule was afterwards obtained for taxing the prosecutor's costs. In last Trinity Term, *W. J. Alexander* obtained a rule for setting aside the two certificates.

(1) 37 R. R. 426 (3 B. & Ad. 295).

(2) Wightman, J. was absent.

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Talfourd, Serjt. and *Greaves* now showed cause :

First, the Judge who tried the cause had power, under stat. 5 & 6 Will. IV. c. 50, s. 98, to certify that the defence was frivolous, and to award costs. It is true that the words there are "the Court before whom any indictment shall be preferred;" but the word "preferred" will apply to the trial, which is a carrying on of the indictment. * * *

[903] As to the costs of the special jury, Lord KENYON is stated to have refused to certify for such costs in a criminal case, in *Rex v. Lord Abingdon* (1). But stat. 6 Geo. IV. c. 50, s. 80, gives the power to appoint a special jury in cases criminal (except treason or felony) as well as civil; and the enactment as to the costs in sect. 34 is quite general. And this appears to have been taken for granted in *Rex v. Moate* (2).

W. J. Alexander, *contra* :

In *Reg. v. Preston* (3) ALDERSON, B., at *Nisi Prius*, considered that he had no power to order costs on a frivolous defence to an indictment removed by *certiorari*, under stat. 5 & 6 Will. IV. c. 50. *Rex v. Upper Papworth* (4) was not exactly a question between the parties to the suit: all that was there done was to apportion a fine between the inhabitants and the trustees who were not parties to the record. The decision, therefore, of WILLIAMS, J. in *Reg. v. Preston* (3), which proceeded upon *Rex v. Upper Papworth* (4), seems not to be sustainable on that authority. * * *

[904] As to the costs of the special jury, *Rex v. Lord Abingdon* (1) shows the practice before stat. 6 Geo. IV. c. 50. Then sect. 34 of that statute speaks only of "the cause," *a word which, in its legal acceptance, seems properly to be confined to civil cases.

[*905]

LORD DENMAN, Ch. J. :

I cannot entertain a doubt on the last point: the language of sect. 34 of the last Jury Act, 6 Geo. IV. c. 50, is perfectly general. Lord KENYON, under the old practice, does not appear, from the report of *Rex v. Lord Abingdon* (1), to have done more than express an unwillingness to exercise the power; and, when he had given that intimation, he probably would not be pressed.

As to the other point, the principal difficulty arises from my brother ALDERSON's decision in the first case of *Reg. v. Preston* (3).

(1) 5 R. R. 733 (1 Esp. N. P. C. 229).

(3) 2 Moo. & Rob. 137

(2) 37 R. R. 421 (3 B. & Ad. 237).

(4) 2 East, 413.

My brother WILLIAMS afterwards took a different view in the second case of *Reg. v. Preston* (1). And I think that the first decision is open to strong observation. For, if the application was made under sect. 95, the Judge had no power to refuse. In fact, however, it is reported to have been made under sect. 98. If so, no doubt the decision would be entitled to great respect: but still we should merely have authorities balanced. *Rex v. Upper Papworth* (2) seems not to have been brought under the notice of my brother ALDERSON: and that case is a direct authority as to the meaning of the word “preferred,” the only word on which a doubt can be raised. The word “tried” might be more directly applicable, because it describes the particular case: but “preferred” is the general word, and admits of several applications: and in *Rex v. Upper Papworth* (2) it was held to include the trying. We are fully warranted in adhering to that authority, *especially in a case where, if we confined our interpretation, we should be rendering the provision nugatory. I do not consider this decision at all inconsistent with that in *Rex v. Richards* (3).

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WILLIAMS, J. :

I am of the same opinion, and for the same reasons. If the word “preferred” could not admit of the larger interpretation, it would be otherwise: but the question is, whether it does so. I certainly should not have decided in contradiction to my brother ALDERSON’S view if he had had *Rex v. Upper Papworth* (2) before him. I thought that case warranted me in giving the larger interpretation to the word.

COLERIDGE, J. :

I am quite of the same opinion. The clause in question is very short: but one thing is clear; that the person who framed it took for granted that the Court before which the indictment was “preferred” would be the Court to dispose of the case; for the words which follow are “if it shall appear to the said Court that the defence made to such indictment was frivolous or vexatious.” Now *Mr. Alexander* scarcely denies that this extends to trials at Nisi Prius as well as Quarter Sessions: yet he calls upon us to give a construction which, in fifteen cases out of twenty, would make the clause of no effect. We know that, unless there be indifference or

(1) 7 Dowl. P. C. 593.

(2) 2 East, 413.

(3) 8 B. & C. 420.

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[*907]

negligence, not fifteen such indictments out of twenty are tried at the Assizes at which they are preferred. The intention therefore could not be as he would construe the clause. Now clearly the word "preferred" will bear the meaning of "carried on." The change of expression, from the former Act, must *have been introduced to enlarge the effect: and I think the word is applicable at any stage to which the prosecution is carried on (1).

Rule discharged.

1842.
Nov. 28.

[915]

BRANDON v. NEWINGTON.

(3 Q. B. 915—918; 12 L. J. Q. B. 20; 3 G. & D. 194.)

Plea, in debt for goods sold, &c., never indebted, except as to 1*l.* 17*s.*, and as to that a tender. Replication, that a larger sum, viz., 2*l.* 7*s.*, including the said 1*l.* 17*s.*, was due from defendant to plaintiff on account of the causes of action, &c., and that before the tender, and while the 2*l.* 7*s.* remained unpaid, plaintiff demanded of defendant the 2*l.* 7*s.*, which included the 1*l.* 17*s.*, and he refused payment:

Held, on special demurrer, no reply to the plea of tender.

DEBT for goods sold and delivered, and on an account stated.

Plea, except as to 1*l.* 17*s.*, parcel &c., never indebted; conclusion to the country. And as to the said 1*l.* 17*s.*, parcel &c., that defendant, at the time when the said sum of 1*l.* 17*s.*, parcel &c., became due, was, and from thence hitherto hath been, and still is, ready to pay plaintiff the said sum of 1*l.* 17*s.*, parcel &c., and that, after the time when the said 1*l.* 17*s.*, parcel &c., became due, and before the commencement of this suit, to wit on &c., defendant was ready and willing to pay, and then tendered and offered to plaintiff to pay him, the said sum of 1*l.* 17*s.*, parcel &c.: verification.

Replication, joining issue on the plea of Never indebted. And, as to the plea of defendant by him lastly above pleaded, that, before and at the time of the making of the alleged tender, and before and at the time of the making of the demand and refusal hereinafter mentioned, a debt or sum amounting to a larger sum than 1*l.* 17*s.*, to wit the sum of 2*l.* 7*s.*, and including the said sum of 1*l.* 17*s.*, was due from defendant to plaintiff for and on account of divers of the causes of action in the said declaration mentioned: and that, before the said *tender, and while the said sum of 2*l.* 7*s.* remained unpaid, to wit on 20th March, A.D. 1842, plaintiff demanded payment from defendant of the said debt or sum of 2*l.* 7*s.*, which said

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(1) Wightman, J. was absent. November 26th and 28th, and
(2) The Court sat in Banc on December 3rd.

sum included the said sum of 1*l.* 17*s.*, parcel &c.: yet defendant did not then pay the said sum of 2*l.* 7*s.* or any part thereof, but then wholly neglected and refused to pay the said debt or sum of 2*l.* 7*s.* and every part thereof: and that no set off or other just cause then existed for non-payment by defendant of the said sum of 2*l.* 7*s.* or any part thereof: verification and prayer of judgment, “and his damages by him sustained by reason of the non-payment of the said sum of 2*l.* 7*s.*”

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Demurrer, assigning for causes that the replication admits the tender of the said sum of 1*l.* 17*s.*, but does not avoid the effect of that tender by showing any subsequent demand of that particular sum, but alleges a demand of a greater sum before the tender was made, which is no answer whatever in law to the plea of tender; and also for that the said replication should either deny the tender, or admit it and acknowledge satisfaction as to the amount tendered and brought into Court, or else show a subsequent demand of the particular sum tendered: and also for that the said replication offers no material issue, and concludes with a prayer of judgment for damages by the plaintiff sustained by reason of the non-payment of the sum of 2*l.* 7*s.*, although the plea is only pleaded as to the damages in respect of non-payment of the sum of 1*l.* 17*s.*, and the plaintiff at the commencement of his replication to the said plea of tender professes only to plead as to the damages sustained by reason of the non-payment of the sum of 1*l.* 17*s.*, &c. Joinder in demurrer.

Petersdorff was called upon by the Court to support the replication:

[917]

A replication like this was held good on demurrer in *Cotton v. Godwin* (1). * * In *Tyler v. Bland* (2) the replication was in nearly the same words as this; and the Court of Exchequer thought it good. *Jones v. Owen* (3) may be cited on the other side: but there it did not appear that the sum alleged in the second plea to have been tendered was not the whole which at that time was due.

Bovill, contra :

The decision in *Tyler v. Bland* (2) seems to have proceeded on the authority of *Cotton v. Godwin* (1). In neither case was the

(1) 7 M. & W. 147.

(2) 9 M. & W. 338.

(3) 5 Ad. & El. 222.

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attention of the *Court of Exchequer drawn to *Spybey v. Hide* (1), where a tender of 5*l.* 1*s.* was pleaded, and the plaintiff replied a subsequent demand and refusal of 5*l.* 1*s.* but proved that he had demanded 11*l.* 6*s.*, and this evidence was held not to support the replication. *Rivers v. Griffiths* (2) is a decision in banc to the same effect. These cases establish the proposition that demand and refusal of a larger sum before or after tender are not equivalent to demand and refusal of a smaller.

Petersdorff was heard in reply.

LORD DENMAN, Ch. J. :

It appears that the Court of Exchequer, in the two cases which have been cited, did not advert to the principle laid down in the earlier decisions. And the point is clear. The defendant by his plea answers, as to the sum of 1*l.* 17*s.*, that he was always ready to pay and did tender that sum. The plaintiff then says, "I demanded more, and you owed more." But the defendant had a right to say, as he does by his pleading, that 1*l.* 17*s.* was all he owed, and that he tendered 1*l.* 17*s.*; and to that the replication is no answer. The defendant is entitled to judgment.

COLERIDGE and WIGHTMAN, JJ. concurred.

Judgment for defendant.

1842.

Dec. 3.

[961]

DALTON v. WHITTEM AND FOX.

(3 Q. B. 961—966; S. C. 12 L. J. Q. B. 55; 3 G. & D. 260.)

If a landlord, under a distress for rent arriere, sever fixtures from the freehold and dispose of them, he is liable in trover, and the articles may be described in the declaration as goods and chattels: and the plaintiff does not thereby waive his right of maintaining that the distress is illegal because fixtures cannot be distrained for rent arriere.

TROVER for "certain goods and chattels, to wit two metal counters, &c."

Plea. Not guilty (by statute (3)).

On the trial, before Lord Denman, Ch. J., at the Middlesex sittings after last Hilary Term, it appeared that certain articles named in the declaration were fixtures attached to a house of which the plaintiff was tenant under the defendant Whittem. Whittem

(1) 1 Camp. 181.

(2) 24 R. R. 505 (5 B. & Ald. 630).

(3) 11 Geo. II. c. 19, s. 21.

sent in a distress for rent due to him from the plaintiff. The distress was executed by the defendant Fox, for Whitem. Fox entered the premises, gave a notice of distress, and afterwards severed from the freehold the articles above mentioned, and sent them to an auction room, where they were sold for Whitem. For the plaintiff it was contended that the fixtures could not be taken under a distress for rent. The counsel for the defendants admitted this, but contended that for such taking trespass was the proper remedy, and that the plaintiff could not bring trover without waiving the tortious severance, and treating the articles as chattels. The LORD CHIEF JUSTICE directed a verdict for the plaintiff on this count. There were other counts, on all of which the defendants had a verdict. His Lordship reserved leave to move for a nonsuit: and, in Easter Term, 1842, *Thesiger* obtained a rule accordingly.

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v.
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Erle and *Udall* now showed cause :

[962]

It is true that trespass might have been brought for severing the fixtures from the realty : but trover will lie also for converting them after the severance. In 1 Chit. Pl. 164 (7th ed.), it is said of trover, " This action is confined to the conversion of goods or personal chattels. It does not lie for fixtures *eo nomine* ; nor for injuries to land or other real property, even by a severance of a part of what properly belongs to the freehold, unless there has also been an asportation." The plaintiff may waive so much of the tort as consists in the severance which converts the fixtures into chattels. The decisions which show that trover cannot be maintained for fixtures apply only to such articles as continue to be fixtures at the time of the conversion. [They cited *Minshall v. Lloyd* (1), *Darby v. Harris* (2), *Rackham v. Jesup* (3), *Hallen v. Runder* (4), *Boydell v. M'Michael* (5), and *Amos and Ferard on Fixtures*, p. 244.

Crompton, *contra* :

[964]

Trover cannot be brought for fixtures while they remain so: after severance trover may be brought, as for ore severed wrongfully from a mine. But here the plaintiff cannot treat the articles as chattels without affirming the distress ; for, if they were chattels, the right to distrain is admitted. * * In *Darby v. Harris* (2), and other cases cited, the point now before the Court was not raised : where

(1) 46 R. R. 638 (2 M. & W. 450).

S. C. 3 Tyr. 959).

(2) 55 R. R. 449 (1 Q. B. 895).

(5) 40 R. R. 519 (1 Cr. M. & R. 177;

(3) 3 Wils. 332.

see note (a), p. 180; S. C. 3 Tyr. 974).

(4) 40 R. R. 551 (1 Cr. M. & R. 266;

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[*965]

the action is shaped in trespass, either fixtures or chattels may be the subject. The distinction between trover and trespass is fully explained by Lord MANSFIELD in *Cooper v. Chitty* (1); where he shows that trover is a remedy for goods and chattels wrongfully *converted, and that the form of action “supposes the defendant may have come lawfully by the possession of the goods.” But such a supposition cannot be made here, unless the goods be treated as chattels at the time of the defendants’ taking possession. The defendants cannot, it is true, take advantage of a wrongful severance by themselves: but they are entitled to the benefit of the plaintiff’s waiver of objection to the severance. The case then is as if the severance, which in this form of action cannot be complained of, had been made by a stranger: how could the plaintiff, in that case, have objected to the distraining of articles so severed? In *Boydell v. M’Michael* (2) the articles were fixtures at the time of the bankruptcy, and the present question could not arise (3).

LORD DENMAN, Ch. J. :

I am of opinion that trover will lie in this case. The defendants cannot say that the articles which they have distrained for rent are not goods and chattels. They say, however, that if the articles are chattels the distress is lawful. That is not a correct view. They cannot commit the wrong of severing the fixtures from the realty, and then take advantage of such wrong and treat them as goods and chattels for the purpose of distress.

WILLIAMS, J. concurred.

COLERIDGE, J. :

[*966]

The argument for the plaintiff assumes only that the removal was improper. *Mr. Crompton* *argues that the articles cannot be called chattels for the purpose of this form of action, and yet fixtures for the purpose of showing the distress to be illegal. I think, however, that it is open to the plaintiff so to treat them. What he says is that they are now goods and chattels, and therefore trover lies; but that the defendants have wrongfully made them so, and shall not defend their distress by such unlawful act. It is like the case of money had and received where the plaintiff’s

(1) 1 Burr. 20, 31; *S. C.* 1 W. Bl. 65.

(2) 40 R. B. 519 (1 Cr. M. & B. 177; *S. C.* 3 Tyr. 974).

(3) *Lee v. Riedon*, 17 R. B. 484 (7 Taunt. 188); and *Nutt v. Butler*, 5 Esp. 176, were cited on the motion for the rule.

goods have been wrongfully taken and sold. The action, to a certain extent, assumes the legality of the sale: but still the plaintiff may say that the property was not in the vendor. The sale is, as it were, protested (1).

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Rule discharged.

PEPPER v. BARNARD AND ANOTHER.

(12 L. J. Q. B. 361—362; S. C. 7 Jur. 1128.)

1843.
May 17.

[361]

Pew—Prescription—Evidence.

In case against the churchwardens of the parish, for disturbance of the plaintiff in a pew claimed in respect of an ancient messuage, when it appeared that there were three adjoining pews, which had been used for many years by the family of the plaintiff, and that repairs had been done at the expense of the family in one or more of these pews, although it did not appear whether in the one claimed in the action: Held, sufficient to support a verdict for the plaintiff, although no evidence was given that the three pews had ever formed one.

CASE against the defendants, churchwardens of the parish of Great Dunmow, in Essex, for disturbance of the plaintiff in the use of a pew, claimed as appurtenant to an ancient messuage. Pleas, first, denying the plaintiff's possession of the messuage; second, denying that the plaintiff was entitled to the pew as appurtenant to it.

The cause was tried before Gurney, B., at the Essex Spring Assizes, 1842: verdict for the plaintiff.

Thesiger, in the following Term, obtained a rule *nisi* for a nonsuit, or for a new trial, as against evidence.

The facts appear in the judgment.

Wordsworth showed cause in Easter Term, 1843.

Montagu Chambers, *contra*, contended that very strong evidence was required to set up a prescriptive right as against churchwardens: and cited the judgment of Sir JOHN NICHOLL in *Pettman v. Bridger* (2), *Morgan v. Curtis* (3), *Dawney v. Dee* (4), *Kenrick v. Taylor* (5), *Walter v. Gunner* (6), *Fuller v. Lane* (7).

Cur. adv. vult.

LORD DENMAN, Ch. J., now delivered the judgment of the Court:

This rule was moved for on the ground that the learned Judge ought to have directed a nonsuit for defect of proof on the part of

(1) *Wightman*, J. was absent.

(2) 1 Phil. 316.

(3) 32 R. R. 718 (3 Man. & Ry. 389).

(4) Cro. Jac. 605; S. C. 3 Lev. 73.

(5) 1 Wils. 326.

(6) 1 Hag. Con. Rep. 314.

(7) 2 Addams, 419.

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the plaintiff. The action was brought for disturbance of the plaintiff in a pew in the parish church of Great Dunmow, in the county of Essex, claimed in respect of an ancient messuage situate in the parish; and on the part of the plaintiff it was proved by evidence, which we think is most abundant and satisfactory, that the messuage, in respect of which the claim was made, is ancient. It further appeared, that so far as living memory extended, there had been three pews adjoining each other, one used by the family, and another by their servants, and a third by a farmer residing on a farm, the house belonging to which was the ancient mansion, and the residence of the family. Under the same roof was a modern addition. With respect to the proof, it has been observed by Justice BULLER, in *Griffith v. Matthews* (1), we think with perfect truth, that it impossible to determine *à priori* what evidence will, or will not, be sufficient to support such a right. It must vary in each particular case; and, accordingly, in the present case, the plaintiff being of the Roman Catholic religion, and her servants frequently having been of the same persuasion, the use of the two pews was less than under other circumstances would have been expected, and was thereby accounted for. We have no doubt, however, that there was proof quite sufficient to warrant the jury in finding the affirmative of the second question submitted to them by the learned Judge, which was, whether the pew in question had always been annexed to the ancient mansion; and, indeed, that there was such evidence was scarcely, if at all, denied; the objection being, that as against the defendants, the churchwardens, mere user, carried back for any length of time, is not sufficient to sustain the action; but that some proof of repairs done to the pew in question is requisite; and that for the alleged defect of such proof the learned Judge ought to have directed a nonsuit. We shall not stop to examine the validity of the objection in point of law, because we are of opinion there was evidence to be submitted to the jury of such repairs. It appears quite clear, from the report, that all the three pews have been used under one and the same claim of right: that is, in respect of the ancient messuage *above mentioned. We think proof of repairs done to one or more of the pews—and such proof was given by more than one witness—furnishes some evidence as to all, and of course, among the rest, as to the pew in question. The rule therefore must be discharged.

Rule discharged.

(1) 2 R. R. 598 (5 T. R. 298).

[*362]

IN THE COURT OF COMMON PLEAS.

BELL *v.* GARDINER (1).

(4 Man. & G. 11—26; S. C. 4 Scott, N. R. 621; 11 L. J. C. P. 195; 1 Dowl. N. S. 683.)

1842.
April 21.

[11]

A negotiable security given by a party in satisfaction of a liability from which he was discharged in law,—in ignorance of the facts which constituted such discharge, cannot be enforced against him, though he may have had the means of knowing those facts.

Therefore, where a bill of exchange indorsed by A. for the accommodation of the drawer, was afterwards altered in a material point, with the consent of the drawer, and when the bill was at maturity, B., the then holder, made a demand upon A., who, ignorant of the alteration, though he had ample means of knowing it, gave B. a promissory note for the amount of the bill and expenses: Held, that it was a good defence to the action on the note by B., that at the time A. gave it, he was not, in fact, aware of the alteration in the bill.

ASSUMPSIT, by one of the public officers of a co-partnership, styled “The National Provincial Bank of England,” upon a promissory note made by the defendant in favour of the Bank, on the 22nd August, 1840, for 203*l.* 5*s.* 6*d.*, at two months after date.

Second plea: that before the making of the note, to wit, on the 11th April, 1840, one William Martin drew his bill of exchange directed to one Samuel Shirley, and thereby requested Shirley three months after the date thereof, to pay to the order of Martin 200*l.*; that Martin then delivered the bill to Shirley, and requested Shirley to accept the same for Martin’s accommodation; *that Shirley then accepted the bill for the accommodation of Martin, and then redelivered the same, so accepted, to Martin; that Martin indorsed the bill with his own name, and then delivered the same to the defendant, and then requested the defendant to indorse the bill for the accommodation of him, Martin; that the defendant then, in compliance with such request, indorsed the bill for the accommodation of Martin, and then redelivered the same to Martin; that he, the defendant, so indorsed the bill for the accommodation of Martin merely, and without having received any consideration or value for such indorsement, and that he had not since received any consideration or value for the same; that at the time he, defendant, so indorsed the bill, the same bore a certain date, to wit, the 11th of April, 1840, and that after the indorsement by the defendant, and after the bill had been redelivered by defendant to Martin as aforesaid, and before the same was paid and delivered to the said

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co-partnership as hereinafter mentioned, to wit, on the day and year last aforesaid, the date of the bill was altered to a certain other date, to wit, the 21st April, 1840, and that such alteration was made without the knowledge or consent of the defendant, and that the defendant was and remained ignorant of such alteration having been made from thence until after the making by him, the defendant, of the said promissory note, and until after the delivery of the same to the said co-partnership, as in the said declaration mentioned, to wit, until and upon the 1st day of September, 1840; that after the making of the alteration in the date of the bill as aforesaid, to wit, on the 21st of April in the year last aforesaid, the said bill with the date thereof so altered was paid and delivered to the said co-partnership, who held the same from thence until afterwards, to wit, on the 22nd of August in the *year last aforesaid; that on the day and year last aforesaid the said co-partnership applied to the defendant for payment to them of the amount of the bill; and thereupon the defendant believing that the bill was in the same state in which it had been when he, the defendant, so indorsed it as aforesaid, and being ignorant of the said alteration in the date thereof, and never having assented or agreed thereto, agreed with the said co-partnership to make and deliver to them the said promissory note in consideration of his said supposed liability to the said co-partnership upon the bill, and for no other consideration whatever; that the defendant, in pursuance of such agreement, did make the said promissory note, and did deliver the same to the said co-partnership as in the said declaration is mentioned, in consideration of his supposed liability upon the bill, and for no other consideration whatsoever. And so the defendant saith that he made the said promissory note, and delivered the same to the said co-partnership in the mistaken belief that he was liable to pay to them the amount of the said bill; and that he, the defendant, never received any consideration or value for making the said promissory note, or for delivering the same to the said co-partnership, or for the payment thereof. Verification.

Replication: *de injuriâ*.

At the trial before Tindal, Ch. J., at Guildhall, at the sittings after last Trinity Term, it was proved, on the part of the defendant, that he had indorsed the bill for the accommodation of Martin, and that the bill then bore date the 11th of April; that the date was afterwards altered to the 21st, with Martin's consent, but without the privity of either the acceptor or the defendant; that the

defendant had made a memorandum *of the time when the bill would fall due, viz., on the 14th July; that notice of the dishonour of the bill, stating it to be due on the 24th of July, was given to the defendant, and the amount was demanded from him; that on two occasions after this notice the defendant saw the bill, and that he gave the note, on which the action was brought, for the amount of the bill and the expenses.

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The LORD CHIEF JUSTICE left it to the jury to say whether, at the time of giving the note, the defendant had any knowledge of the alteration in the bill; and that the question was not, whether he had the means of knowledge, of which there could be no doubt. The jury having found that the defendant had no knowledge of the alteration when he gave the note, the verdict was entered in his favour on the issue of the second plea.

Channell, Serjt., in last Michaelmas Term, obtained a rule *nisi* for judgment for the plaintiff *non obstante veredicto*, or for a new trial, on the ground, either that the plea was no answer to the action, inasmuch as it should have also alleged that the defendant, at the time he gave the note, had no means of knowing that the bill had been altered; or that, if the plea might be considered as also negating the means of knowledge, then the direction of the LORD CHIEF JUSTICE was incorrect. He put the case as standing upon the same ground as if the defendant had paid the note, and was seeking to recover back the amount in an action for money had and received: *Bilbie v. Lumley* (1), *Milnes v. Duncan* (2).

Talfourd, Serjt. (with whom was *Gray*) now showed cause:

The question is, whether the note was given by the defendant under a mistake as to the real facts; for, if so, although that mistake may have arisen from his own *negligence, payment cannot be enforced. This case has been put by the other side on the same footing as an action for money had and received. It may be so considered; and none of the decided authorities, from *Bilbie v. Lumley* downwards, militate against the proposition contended for on the part of the defendant. But the question may be considered as set at rest by the recent case of *Kelly v. Solari* (3), where it was held, that if a party pay money under a forgetfulness of facts at the

[*15]

(1) 6 B. R. 479 (2 East, 469).

Dowl. & Ry. 731).

(2) 30 B. R. 498 (6 B. & C. 671; 9

(3) 60 B. R. 666 (9 M. & W. 54).

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time of payment, he is entitled to recover it back, though he had full means of knowledge at the time. * * In *Bilbie v. Lumley* (1) it appeared not only that the party who made the payment had the means of knowledge, but also that he had the actual knowledge, of all the material facts. In every case where the plaintiff has been held entitled to recover money paid under a mistake of the facts, the means of knowledge existed, if they had been exercised. [He cited *Bize v. Dickason* (2), *Cox v. Prentice* (3).] The principle upon which all these cases have been decided, has, in truth, nothing to do with the fact of the party having or not having the means of knowledge. If, indeed, a payment be made voluntarily either with a full knowledge of the facts, or under a determination not to inquire into them, the money so paid cannot be recovered: but that is not the present case; for it is obvious that this defendant always considered *himself liable upon the bill, and was so treated by the other parties, when, in fact, he was discharged from his liability by the alteration that had been made in the bill. The note, therefore, was given by the defendant under a belief that he was discharging a legal liability; there was a mistake in fact, and not in law; consequently the note cannot be enforced against him.

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[*19]

(1) 6 R. R. 479 (2 East, 469).

(2) 1 T. R. 285. *Bize v. Dickason* would seem to be the case of a payment made rather under a mistake of law than of fact. It does not appear from the report that the plaintiff was in ignorance of any of the facts. The rule laid down by Lord MANSFIELD is very broad: "Where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action" (p. 287). GIBBS, J., in commenting upon this case in his judgment in *Brisbane v. Dacres*, 14 R. R. 718 (5 Taunt. 154), says, "It is most certain that the only question under the consideration of the Court was, whether the right of the broker, —who had a *del credere* commission,—to make the deduction, ranged itself under the case of *Grove v. Dubois* (16 R. R. 664, n.; 1 T. R. 112), and *Mingay* declined all argument, and gave up the case. It was taken for granted without argument, that if the plaintiff would have had a right to make the deduction before payment, he might

recover back the amount after payment." And afterwards, observing upon the passage from Lord MANSFIELD's judgment above cited, he adds, "Mistake may be a mistake of law or of fact; but I cannot think Lord MANSFIELD said 'mistake of law,' for Lord MANSFIELD had, six years before in *Louvy v. Bourdieu* (2 Doug. 467), heard it said, 'money paid in ignorance of the law could not be recovered back,' and had not dissented from the doctrine, and BULLER, J. sat by him, who had expressly stated the distinction six years before, in *Louvy v. Bourdieu*, and would not have sat by and heard the contrary stated without noticing it." [See now *Barber v. Pott* (1859) 4 H. & N. 759, 765 and 4 R. R. Pref. viii.]

Upon the point that money paid under a mistake of law, but with knowledge of the facts, cannot be recovered, *Brisbane v. Dacres* (14 R. R. 718; 5 Taunt. 143), is a leading authority. And see *post*, 449.

(3) 16 R. R. 288 (3 M. & S. 344).

(TINDAL, Ch. J. : It appears that at one time the defendant must have known the bill had been altered ; as the memorandum, in his own writing, shows the time when it was originally due.)

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The fact was not in his mind at the time he gave the note : the jury have so found, and that amounts to want of knowledge on his part.

Independently of the want of knowledge there is, moreover, enough upon the face of the plea to afford a good defence. It is stated, that the note was given without consideration ; and that would be sufficient after verdict. * * *

Channell, Serjt., in support of the rule :

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The decision in *Kelly v. Solari* (1), which had not been reported when the present rule was moved for, is undoubtedly adverse to the plaintiff ; but still that case is to be distinguished from the present. The circumstances of this case are strong to show that the defendant had actual knowledge of the alteration of the bill at the time he gave the note ; but as the jury have found the other way, it must be so taken. Still there can be no doubt that he had the amplest means of knowing the fact. The previous authorities certainly seem to bear out the proposition, that it is not enough for a party to have made a payment in ignorance of the facts, but that if he had full means of knowledge he cannot recover the money paid. And this rule appears to be consonant with common sense. Suppose a party to make a payment in ignorance of facts, which by using the most ordinary diligence he might have ascertained, it seems hard upon the party receiving the money that he should be obliged to refund it, after a long period has elapsed, and when the situation of the parties may have been entirely changed ; for if the rule contended for is strictly adopted, it would follow that the party paying under such circumstances might recover the money at any time within six years. [He cited *Milnes v. Duncan* (2) and *Bilbie v. Lumley* (3).]

TINDAL, Ch. J. :

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The question before the Court arises upon a plea in answer to a declaration against the maker of a promissory note ; in which plea the defendant alleges that the note was given under a mistake as to the facts, and, in effect, states that the defendant having indorsed

(1) 60 B. R. 666 (9 M. & W. 54).

Dowl. & Ry. 731).

(2) 30 B. R. 496 (6 B. & C. 671 ; 9

(3) 6 B. R. 479 (2 East, 469).

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a bill of exchange for the accommodation of the drawer, the bill was afterwards, without the defendant's knowledge, altered in a material point, so as to relieve him from his liability; that a demand being made upon him in respect of the bill, he gave the note in satisfaction of that demand, being ignorant at the time that he had been discharged from liability by the alteration of the bill. That is the general substance of the plea. Then the question is, whether this plea is sufficient without further alleging that the defendant, at the time he gave the note, was *also without the means of knowledge of the alteration of the bill. Whatever doubts might have been created by the *dicta* in *Bilbie v. Lumley* (1) and other cases, it appears to me that the late case of *Kelly v. Solari* (2) is decisive upon the point, and establishes that it is not necessary to the validity of such a plea that it should negative the existence of the means of knowledge as well as actual knowledge. We can, in fact, regard the possession of the means of knowledge only as affording a strong observation to the jury to induce them to believe that the party had actual knowledge of the circumstances; but there is no conclusive rule of law that, because a party has the means of knowledge, he has the knowledge itself. There is no ground, therefore, for a rule for judgment *non obstante veredicto*.

There may be cases where the existence of the means of knowledge might lead irresistibly to the inference that the party had actual knowledge; but I think, as the jury have found that the defendant had not knowledge, in fact, when he gave the note, that this rule must be discharged. I may add, however, that the case of the present defendant is, in my opinion, stronger in his favour than if the money had been actually paid over and was sought to be recovered back; for here the defendant stands upon the invalidity of the document which he is called upon to pay.

COLTMAN, J. :

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The case of *Kelly v. Solari* (2) has certainly modified an impression which previously existed in the profession, that a party, in order to recover back money paid under a mistake of facts, should also show that he had no means of knowing them. The inconvenience that has been pointed out in argument may *undoubtedly exist; but it is not sufficient to induce us to differ from that case, which must decide this question. I agree also, that this is a stronger case than

(1) 6 B. R. 479 (2 East, 489).

(2) 60 B. R. 666 (9 M. & W. 54).

the recovering back of money actually paid; for this is no more than a promise to pay.

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ERSKINE, J. :

I am of the same opinion. It appears that the late case of *Kelly v. Solari* has overruled the *dicta* in the other cases cited at the Bar; and it must now be taken that it is no answer in an action for money had and received, brought to recover back money paid by mistake, to say that the party had the means of knowing the facts, if he had not the knowledge in reality. But I think this case does not wholly depend upon that point. This is not an action to recover back money. If a party has paid money with a full knowledge of all the circumstances, he cannot recover it back; it is like a gift or a present; but this is an action brought on a note, for which the defendant says there was no consideration. He says, in effect, "I thought I was liable upon the bill at the time I gave the note; but I was ignorant of a fact that had freed me from my liability, and therefore there was no consideration for my signing the note." The jury have found that the note was given in ignorance of that fact; there was therefore no consideration for it. It is a much stronger case than *Kelly v. Solari*; and there is nothing unconscientious in the defendant's resisting the claim.

CRESSWELL, J. :

I also am of opinion that this rule must be discharged. It has hardly been contended that the direction of the LORD CHIEF JUSTICE was incorrect. The question left to the jury was, whether the note had been given in ignorance of the alteration of *the bill. They have found it was so given, and no attempt is made to disturb their verdict in that respect. But a point is now raised, whether it was sufficient for the defendant to negative knowledge of the alteration, or whether it was not necessary for him to negative also the possession of the means of knowledge. The case has been argued upon analogy to an action for money had and received; and in that view I should consider we were bound by the late case of *Kelly v. Solari* (1), which does not appear to me to be at variance with the decisions in former cases. Where a party has the means of knowledge, it may be evidence of actual knowledge; but no case has been decided that means of knowledge are equivalent, as a matter of law, to actual knowledge. In *Milnes v. Duncan* (2), a party who had paid money in ignorance

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(1) 60 R. R. 666 (9 M. & W. 54).

(2) 30 R. R. 498 (6 B. & C. 671; 9 Dowl. & Ry. 731).

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of the real facts, though he had the means of knowledge, was held entitled to recover. But, supposing the means of knowledge to be equivalent to actual knowledge, I do not see how the absence of *laches* could make any difference.

On the second point the case in the Exchequer is strongly in favour of the defendant. This is not an action to recover money. If money be paid without consideration, and with a full knowledge of the facts, it cannot be recovered back; but a party who makes a promise without consideration, in ignorance of the true state of the facts, may certainly say he is not bound to the performance of it. Suppose, in this case, the defendant, omitting the latter part of the plea, had only stated that there was no consideration for the note by reason of his want of knowledge of the facts, and the plaintiff had replied, "you had the means of knowledge," would that replication have been sufficient? I *apprehend, clearly not. On the authority, therefore, of *Kelly v. Solari* I think the rule must be discharged.

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Rule discharged (1).

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DOE D. STANWAY v. ROCK (2).

(4 Man. & G. 30—34; S. C. 11 L. J. C. P. 194; Car. & M. 549; 6 Jur. 266.)

In 1816 A. let B. into possession of lands under an agreement for purchase, which was never completed. B. continued in possession till his death in 1822, without having paid rent. He devised all his real estate to C., his widow, who entered into possession of the premises. Rent was demanded of her in 1827, which she promised to pay, but did not.

In ejectment for the premises brought in 1842 by parties claiming under A., it was left to the jury to say whether a tenancy at will had been created between A. and C., the action being otherwise barred by the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), s. 7: Held, a proper direction.

EJECTMENT, for certain shambles in the market-place of the town of Wednesbury.

(1) See *Hornbuckle v. Hornbury*, 19 R. R. 698 (2 Stark. N. P. C. 177); *Williams v. Bartholomew*, 4 R. R. 816 (1 Bos. & P. 326); *Stevens v. Lynch*, 12 East, 38; S. C. 2 Camp. 332; *East India Company v. Tritton*, 27 R. R. 353 (3 B. & C. 280, 290; S. C. 5 Dowl. & Ry. 214); Dig. lib. 22, tit. 6; Doctor and Student, Dial. 2, cap. 46, 47; Pothier, *Traité de l'Action Condictio indebiti*, part 2, sect. 3, art. 3; 2 Nev. & M. 711; 6 Nev. & M. 87 (a); *Chatfield v. Paxton*, 14 R. R. 724 (2 East, 471, n.), more fully stated by GIBBS, Ch. J. in 5 Taunt. 155.

In *Lucas v. Worswick*, in the Court of Common Pleas of the County Palatine of Lancaster, 42 R. R. 798 (1 Moo. & Rob. 293), Lord DENMAN, Ch. J. and BOL- LAND, B. held that money had and received lies to recover back the amount of a payment made under a forgetfulness of facts.

(2) Explained in *Drummond v. Sant* (1871) L. R. 6 Q. B. 763, 768, 41 L. J. Q. B. 21; and followed in *Sands to Thompson* (1883) 22 Ch. D. 614, 616, 52 L. J. Ch. 406; see also *Warren v. Murray* [1894] 2 Q. B. 648, 64 L. J. Q. B. 42, C. A.—A. C.

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At the trial before Patteson, J., at the last Assizes for the county of Stafford, the only question was, whether the lessor of the plaintiff was barred by the Limitation of Actions Act (3 & 4 Will. IV. c. 27). The following facts were proved.

About the year 1816, one Richard Woolrich entered into an agreement for purchasing the piece of land in question from Sir Joseph Scott, Bart. and Mr. Foley, lords of the manor of Wednesbury, for the sum of 30*l.*; and under this agreement Woolrich was let into possession. In January, 1817, Woolrich entered into a written contract with one Thomas Butler for the sale of his equitable interest in the premises for 100*l.* This contract recited the former agreement, and that Woolrich had got no conveyance of the land, and was unable to pay the purchase-money; and that he had erected shambles on the land in question. Woolrich, however, continued in possession till his death, the exact date of which did not appear, but he was buried on the 8th of January, 1822. By his will he devised all his real estate (generally) to his widow; and she received the rents of the shambles in question down to her death in 1837. There was no evidence of any payment of rent by Woolrich or his widow to Scott and Foley; but it was proved, that in the year 1827 the latter held a rent day, and sent a message to Mrs. Woolrich, desiring her to come over and pay the rent for the shambles, and that she sent back word that she would come, or send over, presently; *but it was not proved that she either went or paid the rent. Mrs. Woolrich made a general devise of all her real estate, equally, among her children by a former marriage with one Rock. After her death the defendant, one of these children, received the rents of the shambles. No rent was ever paid by him to Scott and Foley.

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In 1836 Butler died, having appointed the lessor of the plaintiff one of his executors, and devised and bequeathed to him considerable interests both in his real and personal estates.

In 1839 (after previous negotiations) the representatives of Scott and Foley conveyed the premises in question, in fee, to the lessor of the plaintiff; but no notice was taken in the conveyance of the original contract for sale to Woolrich.

The declaration in the present ejectment was served on the 8th of January, 1842, exactly twenty years after the day of Woolrich's burial.

It was contended on the part of the plaintiff that, even supposing the evidence was not satisfactory as to a fresh tenancy having been

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created between the lords of the manor and Mrs. Woolrich, still, Woolrich having been let into possession under a contract for purchase before the conveyance, the lords of the manor were mere trustees for him; that his widow, claiming under him, was in the same situation; and that the case consequently fell within the provision of the seventh section of the stat. 3 & 4 Will. IV. c. 27 (1).

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On the part of the defendant it was contended, that Mrs. Woolrich never was tenant to the lords of the manor; that Woolrich, under the circumstances, was merely a tenant at will under them; that his tenancy was determined, at the latest, by his death; and that consequently the action was not brought in time: and also that the proviso of the seventh section did not apply. PATTERSON, J. (after consulting CRESSWELL, J.) was of opinion that the proviso applied only to cases of express trusts; and the only question left to the jury was, whether Mrs. Woolrich had become tenant at will to Scott and Foley. The jury found in the negative, and returned a verdict for the defendant.

Talfourd, Serjt. now moved for a new trial, on the ground of misdirection:

He renewed the objection taken at the trial, and contended that the right of the lessor of the plaintiff was preserved under the proviso of the seventh section of the Act. In Sugden on Vendors and Purchasers, the rule is laid down that "when a contract is made for the sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase-money for the vendor" (2). In the present case, therefore, the lessor of the plaintiff, claiming under the original vendors, is in the situation of trustee for the purchaser and those who claim under him; for, although there was no express trust, there was an implied one, which brings the case sufficiently within the terms of the statute. If the lessor of the

(1) Which enacts "That when any person shall be in possession, or in receipt of the profits, of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination

of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

(2) Vol. I. p. 273, 10th ed.

plaintiff can avail himself of the equitable relation of trustee and cestui que trust, there has been no adverse possession. In *Hall v. Doe d. Surtees* (1), where premises were mortgaged in *fee with a proviso for reconveyance if the principal were paid on a given day, and in the mean time that the mortgagor should continue in possession: upon special verdict it was found that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury either that interest had or had not been paid by the mortgagor; and it was held that, upon the finding, it must be taken that the occupation was by the permission of the mortgagee; and consequently that, although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the Statute of Limitations.

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(COLTMAN, J. referred to *Howard v. Shaw* (2).)

At any rate, supposing Woolrich to have been tenant at will when he died, his widow must be taken to be in the same situation, as she claimed under him; she was in by permission of the lords of the manor, under a similar relation. In *Doe d. Bennett v. Turner* (3), the lessor of the plaintiff, had, in the year 1817, let the defendant into possession of lands as tenant at will, and in 1827 had determined such tenancy by entry upon the land, and cutting and carrying away stone without the tenant's consent; and the Court held, that if the tenant was in afterwards by sufferance only, then the twenty years must be calculated from the expiration of the first year after the commencement of the original tenancy at will, viz. in the year 1818; but that, if a new tenancy at will was created between the parties, then the twenty years should be calculated from the expiration of the first year of such new tenancy, viz. in the year 1828. The determination of the first tenancy at will was, in that case, effected by the act of the landlord; here, by the death of the tenant; but if a new tenancy at will *was created, then the statute would not begin to run till the end of a year from the commencement thereof, viz. in 1823; and if that were so, the present ejectment was brought in time.

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TINDAL, Ch. J.:

In order to constitute a tenancy at will something must be done

- (1) 24 E. R. 529 (5 B. & Ald. 687; (2) 58 E. R. 641 (8 M. & W. 118).
1 Dowl. & Ry. 340). (3) 56 E. R. 692 (7 M. & W. 226).

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by the lessor. It appears to me that it was properly left by the learned Judge to the jury to say, whether a tenancy at will had been created between the lords of the manor and Mrs. Woolrich, that being the only fact on which there could be any question in the case.

ERSKINE, J. :

There appears to have been no evidence to show that Mrs. Woolrich claimed under her husband.

COLTMAN and CRESSWELL, JJ. concurring,

Rule refused.

[The ruling of PATTESON, J. at N. P., was as follows (Car. & Marsh, p. 552):

I have conferred with my brother CRESSWELL, and he agrees with me in thinking that the proviso contained in the seventh section of the stat. 3 & 4 Will. IV. c. 27, does not apply to this case. A person let in under a purchase is a tenant at will, and this proviso applies only to declared and express trusts and not to trusts in equity of this kind. That reduces it to the question whether the widow of Richard Woolrich became tenant at will under a new taking; because if the only tenancy at will was the husband's, that was determined more than twenty years ago, as it is quite clear that that tenancy at will was determined by the death of the husband. The only question is whether there was a new tenancy: for if there was the present ejectment is brought within twenty years after the first year of that tenancy. With regard to a demand of possession none was necessary, because we have it that the new tenancy, if such ever existed, was determined by the death of the widow, which occurred before the 8th of January, 1842. The jury will have to say whether there was a new tenancy at will by the widow after the death of the husband; and of that the evidence is very slight. No rent ever paid—no act by which she acknowledges herself to be tenant. Nevertheless, as there is some evidence, I must leave it to the jury.

Verdict for the defendant.]

M'LAUGHLIN v. PRYOR (1).

(4 Man. & G. 48—82; S. C. 4 Scott, N. R. 655; 11 L. J. C. P. 169; Car. & M. 354.)

1842.
April 26.

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A party, consisting of the defendant and others, hired for a day's excursion a carriage and post-horses, driven by postilions, who were the servants of the owner of the horses. The defendant rode upon the box. The postilions, in endeavouring to force their way into a line of carriages, overturned a gig, and seriously injured the plaintiff, who was in the gig. The defendant, at the time and afterwards, held himself out as responsible for the accident, and used expressions showing that he had a control over the postilions at the time it happened :

Held, that he was liable in trespass (1).

TRESPASS. The declaration stated that the defendant heretofore, to wit, on &c., with force and arms forced and drove a certain carriage and certain harness attached thereto, and with which the same was then being drawn, upon and against a certain carriage, to wit, a gig, in which the plaintiff was then riding in and along a certain public and common highway, and thereby pulled over and upset the said gig, and thereby the plaintiff was then cast and thrown with great force and violence from and out of the said gig to and upon the ground there, and was there greatly bruised, hurt, and wounded, &c. (with special damage in loss of business as a newspaper editor, and in the employment of other persons to publish the same).

Pleas : first, not guilty; on which issue was joined; secondly, that at the time when &c. the plaintiff was being driven in the said carriage called a gig, by a person whose name is to the defendant unknown, in and along the said highway, and at the said time when &c. the same was so carelessly and negligently and improperly driven, stopped and managed by the said person in the said highway, near to the said carriage and harness so forced and driven by the defendant as in the declaration *mentioned, that by reason thereof the said carriage and harness, without any default or wrong on the part of the defendant, was forced and driven by the defendant upon and against the said carriage called a gig, and thereby pulled over and upset the same, and occasioned the said injuries and damages in the said declaration mentioned; and so the defendant says that if any hurt or damage then happened

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(1) This case would appear to be in reality only a decision upon a question of fact. It was distinguished in *Holmes v. Mather* (1875) 10 Ex. 261, *BRAMWELL, B.*, at p. 269, 44 L. J. Ex. 176, on the ground that "the defendant

was present, and was supposed to be taking part in the control of the animals." See also *Jones v. Corporation of Liverpool* (1885) 14 Q. B. D. 890, 54 L. J. Q. B. 345; *Jones v. Scallard* [1898] 2 Q. B. 565.—A. C.

M'LAUGHLIN to the plaintiff, the same was caused and occasioned by the said
 v. negligent, careless, and improper driving of the said carriage called
 PRYOR. a gig, and not by any default of the defendant, which is the said
 supposed trespass in the said declaration mentioned.

Replication to this plea, *de injuriâ*.

At the trial before Tindal, Ch. J., at the sittings in London after last Trinity Term, the following facts were given in evidence on the part of the plaintiff.

On the 3rd of June, 1840, the plaintiff was proceeding to Epsom races in a pony gig, belonging to and driven by one Mason. The defendant, who, together with a party of friends, had hired a carriage and four post-horses, driven by two postilions in the service of the owner of the horses, was on his way to the same place. The defendant and another person rode on the box of this carriage. At the toll-bar at Sutton a line of carriages had formed, and Mason's gig was in that line. The carriage in which the defendant and his friends were driving came up to the toll-bar about the same time with Mason's gig, but the carriage was out of the line. Mason's gig was advancing at the time slowly in the line (there being a stoppage for the purpose of taking toll at the gate), when the postilion on the wheel-horse of the carriage in which the defendant was seated, called out to the postilion on the leader, "go in there." The latter immediately turned his horses' heads before Mason's gig. Mason endeavoured to keep his pony in
 [*50] *the line, when the man on the wheel-horse of the carriage again called out, "Go on, you are all right there." The postilion on the leader again pushed his horses forward, and the trace of the wheel horse caught the wheel of Mason's gig and pulled it over, and both the plaintiff and Mason fell out. Some one in the carriage called out, "Go on, go on!" but Mason got up, and laying hold of the horses' heads, stopped them; telling the party in the carriage that they should not move on; for he was determined to take the horses back to the "Cock" at Sutton, until he knew to whom they belonged. Several of the parties then got out of the carriage, and the defendant said to Mason, "If you do that, in what an awkward predicament you will place us—we can neither get to the races nor get home." After some further discussion, he added, "I will settle it with you here now; I will give you money to any amount; tell me what you want, you shall have it." Mason refused to settle the matter then, and at last the defendant gave his card to him, saying that he would be answerable for all that had occurred,

if he would allow him to proceed. The carriage then drove on. Some days afterwards Mason called on the defendant at his chambers, and told him he came about the damage done to the chaise. The defendant said it should be repaired; he was in duty bound to repair it, and that he would send a man to look at it. He did not do so however, and Mason, having got it repaired, called again upon the defendant with the account, who said he would pay it, and was about to do so, when he added, "I shall not pay it now, for if I pay you this amount, Mr. M'Laughlin will expect me to pay whatever demand he may make upon me; you shall be paid it, but I shall not pay it now; I will settle Mr. M'Laughlin's affair before I settle yours." Some dispute then arose between the parties as to the accident, and the defendant *said, "If you had quietly gone out of the line it would not have happened; if you had done that, I had intended to have pulled up and let you in again, in the front." He added, that the general way of going to races was to cut out and cut in, and get on in the best way one could. Mason then said to the defendant, "If you will give me up the proprietor of the horses and carriage, I will exonerate you from the repair of the chaise altogether;" but the defendant said he should give up no names,—he had made himself liable for the damage that had occurred. The plaintiff was very seriously injured by the upsetting of the gig, and had become permanently lame.

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It was contended on the part of the defendant, on the authority of *Laugher v. Pointer* (1), and *Quarman v. Burnett* (2), that, not being the owner of the carriage and horses, he was not liable to the action. The LORD CHIEF JUSTICE however ruled that those cases did not apply to an action of trespass, but reserved leave to the defendant to move to enter a nonsuit.

Evidence was called, on the part of the defendant, to show that the defendant had called out to the post-boys to let Mason's gig drive on before them; and that the gig had been driven against the horses of the carriage. The post-boy who rode the leaders on the occasion (the other one being absent from the country), stated that they had no orders to break into the line, that "nobody said any thing to them."

The LORD CHIEF JUSTICE told the jury, that in order to find a verdict for the plaintiff, they must be satisfied that the accident

(1) 29 R. R. 319 (5 B. & C. 547); (2) 55 R. R. 717 (6 M. & W. 499).
8 Dowl. & Ry. 556).

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PRYOR. arose from the carriage driving against the gig, and not from the gig driving against the carriage. The jury found a verdict for the plaintiff, damages 600*l.*

[52] *Channell*, Serjt., having in Michaelmas Term last, obtained a rule *nisi* to enter a nonsuit, pursuant to the leave reserved :

Talfourd, Serjt. now showed cause :

It is submitted that the defendant is responsible for the injury done to the plaintiff. The defendant being on the box of the carriage, and having the opportunity of seeing what was passing, and possessing the power of controlling the postilions, must be held to have sanctioned them in their attempt to break the line of carriages ; and if so, such sanction made him a trespasser. In point of fact, the evidence at the trial showed that the parties on the box were exercising a control over the post-boys, and giving them directions. [He cited *Gregory v. Piper* (1).]

[53] *Channell*, Serjt., in support of the rule :

The plaintiff here charges the defendant as an actor in driving the carriage against the gig ; and the question raised by the plea of not guilty is, whether he was so. The defendant has also pleaded that there was negligence on the part of the plaintiff, and if that were so the defendant is not liable in trespass. It is not disputed that the carriage was hired ; that the horses were post-horses ; and that the plaintiff was not actually driving, though he was sitting on the box. The case, therefore, falls within the principle of *Laugher v. Pointer* (2) and *Quarman v. Burnett* (3). It is true that those actions were in case ; but the main point for consideration is the degree of responsibility which attaches to the hirer of a carriage or horses under circumstances like the present ; and as to that, it can make no difference whether the form of the action be trespass or case. The facts in *Quarman v. Burnett* (3) were peculiarly strong to raise the inference that the coachman, by whose negligence the accident happened, *was the servant of the defendants ; he was the party regularly employed ; he was paid a regular sum for each drive, according to express agreement ; he was sometimes taken by the defendants into the country for weeks together, and was then paid a regular sum per week ; and he wore a livery of theirs, for

[*54]

(1) 33 R. B. 268 (9 B. & C. 591 ; 8 Dowl. & Ry. 556).
4 Man. & Ry. 500).

(3) 55 R. B. 717 (6 M. & W. 499).

(2) 29 R. B. 319 (5 B. & C. 547 ;

which he had been measured; but he was held not to be their servant so as to render them liable for his negligence. The facts in the present case are not nearly so strong to show that the postilions were in this defendant's service. * * *

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TINDAL, Ch. J. :

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The leave to move to enter a nonsuit was reserved, for the purpose of examining whether the authorities that were cited at the trial were applicable to the present case, and whether the principles which regulate an action on the case could be applied to an action of trespass.

At the trial, I was desirous that the merits of the case should be inquired into, and I reserved, for the *opinion of the Court, the question, whether the doctrine laid down in *Quarman v. Burnett* (1), where the principle of exemption was carried to a considerable extent, would apply to the circumstances of this case. It was intended that it should be determined upon the evidence, whether the defendant could properly be considered as a trespasser.

[*56]

It appears to me, that the cases in which it has been decided that the hirer of a carriage and horses is exempted from responsibility for the acts of the driver—not being his servant—rest upon a very different ground from the present. In those cases, the party hiring had no power of selection as to the person employed in driving; and therefore it was held, that he was not responsible for the want of skill of the driver, who could not be considered as his servant; that the person who was really the master of the driver, was bound to select a proper person to be employed as driver.

But in this case the question is, whether the defendant was a joint trespasser with the post-boys, and this question obviously rests upon a very different ground.

The general rule is, that all persons acting together at the time of the commission of a wrongful act, are presumed to assent thereto, and are considered in law as equally trespassers, and are all looked upon as principals. The inquiry is, not whether the act was wilful, but whether it was wrongful, and an immediate injury resulted from it; any inquiry into the intention of the party is quite unnecessary. That was decided in *Leame v. Bray* (2), which was an action against the defendant, who had driven his carriage against another's, not wilfully, but by accident; and it was held

(1) 55 R. R. 717 (6 M. & W. 499).

(2) 3 East, 593; 5 Esp. N. P. C. 18.
(See Pref. 7 R. R. vii.)

M'LAUGHLIN that *the proper remedy was trespass; and the distinction laid
 v. down was, that where the injury was immediate from an act of
 PRYOR. force done by the defendant, the remedy was in trespass; but
 [*57] where the injury was only consequential to an act before done by
 the defendant, then an action on the case lay. Lord ELLENBOROUGH
 in giving judgment says, "The true criterion seems to be, according
 to what Lord Chief Justice DE GREY says in *Scott v. Shephard* (1),
 whether the plaintiff received an injury, by force, from the defend-
 ant. If the injurious act be the immediate result of the force
 originally applied by the defendant, and the plaintiff be injured by
 it, it is the subject of an action of trespass, *vi et armis*, by all the
 cases both ancient and modern. It is immaterial, whether the
 injury be wilful or not" (2). GROSE, J., in giving his opinion (3),
 says, "Looking into all the cases, from the Year Book in the
 T. 21 Hen. VII. (4) down to the latest decision on the subject, I
 find the principle to be, that if the injury be done by the act of the
 party himself at the time, or he be the immediate cause of it,
 though it happen accidentally or by misfortune, yet he is answer-
 able in trespass" (2). And LAWRENCE and LE BLANC, JJ. express
 the same opinions. Now in this case there can be no doubt, upon
 the finding of the jury, that the post-boys, by reason of their
 [*58] *wrongful act, were trespassers. Then the question is, whether
 the defendant was jointly a trespasser with them; whether the
 part which he took in the proceeding was sufficient to make him
 equally liable with them; and whether there were circumstances
 in the case which would justify the jury in coming to that con-
 clusion. It appears that he was riding on the box of the carriage
 when the accident occurred, and saw what was going on; that
 there was a line of carriages, into which the post-boys were
 endeavouring to force themselves; and he must have known the
 object of the post-boys in doing what they did. If he had

(1) 3 Wils. 403, 411; 2 W. Bl. 892, 899. And see 3 Man. & G. 520.

(2) See, however, *Holmes v. Mather* (1875) 10 Ex. 261, 269, 44 L. J. Ex. 176; *Stanley v. Powell* [1891] 1 Q. B. 86, 60 L. J. Q. B. 52.—A. C.

(3) 3 East, 600.

(4) T. 21 Hen. VII. fo. 28, pl. 5, where REDÉ, Ch. J. says, "Although the intent of the defendant was good (in carrying the plaintiff's tithes from the defendant's field, where they were secured, to the plaintiff's house); here,

the intent cannot be construed; but it can be in felony; as, if a man shoots at the butts, and kills a man, it shall not be felony, because he had not the intention to kill; and so of a tiler from a house, who, without knowing it, kills a man with a stone, it is not felony; but where one shoots at the butts and wounds a man, although it were against his will, he shall be said to be a trespasser, against his intention."

remonstrated or expostulated with them at the time, I do not think he could have been held liable in this action, even upon the supposition that the post-boys were his servants; for no servant can make his master a trespasser against his will: *Morley v. Gaisford* (1), *M'Manus v. Crickett* (2). Or if he had been inside the carriage, and had not seen what was going on, and the post-boys, of their own will, had done the injury, I do not think the defendant would have been liable. But the fact of his being outside the carriage, with a full view of all that was taking place and not interfering, though I do not say it is strong evidence, is some evidence, to go to the jury that he assented to the act of the post-boys. But the case does not stop there; for his subsequent conduct is to be taken into consideration. There is nothing to show that he repudiated the act of the post-boys; on the contrary, he professed throughout to hold himself responsible; he told the witness Mason, who was driving the gig in which the plaintiff was seated at the time the accident happened, that if he had succeeded in getting into the line, he should *have allowed Mason to return to his former position in the line. All this shows that he had a control over the post-boys, and that he assented to their acts.

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I think, therefore, that this is a case in which the defendant may be considered as the master, the *dominus pro tempore*, of the carriage and horses; he being present at the time when the accident happened, and assenting to the act by which it was caused; and that the present case falls within the principle of *Chandler v. Broughton* (3), and *Gregory v. Piper* (4). It seems to me on the whole, that the jury justly came to the conclusion that the defendant was a co-trespasser with the post-boys; and that the verdict ought not to be disturbed.

COLTMAN, J. :

It seems to be agreed in this case that the Court is to be considered in the situation of a jury; and the question for our determination is, whether at the time that the accident happened the defendant assented to the acts of the postilions. This fact depends in a great measure upon Mason's evidence; and I see no reason why credit should not be given to it. (His Lordship recapitulated the facts of the case.)

(1) 3 R. R. 432 (2 H. Bl. 442).

(2) 5 R. R. 518 (1 East, 106).

(3) 1 Cr. & M. 29; 3 Tyr. 220.

(4) 33 R. R. 268 (9 B. & C. 591;
4 Man. & Ry. 500).

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It appears, then, that the defendant throughout said that he would be responsible for the damage. This certainly will not make him liable as a trespasser, unless he were so from the beginning; but I think it is evidence to show his previous assent to the act that was done by the postilions. He never repudiates their act; he never says it was not his own act; and I think if the case had been left to the jury on the mere question of assent, they would have found in the affirmative.

[60] ERSKINE, J. :

I am of the same opinion. The cases in which it has been decided that case will not lie against the hirer of a carriage and horses for the misconduct of the driver, not being his servant, do not apply here; for this is an action treating the defendant as a co-trespasser, and is not brought against him as a master for the misconduct of his servant.

The mere fact of the defendant being one of the persons who hired the carriage and horses, would not make him liable in this action; but it must be shown that he was assenting to the act from which the injury occurred to the plaintiff. It is not necessary to show that the defendant contemplated the injury that happened; for if the act of the post-boys in driving into the line was wrongful, and the defendant assented to it, or gave encouragement to its being done, he will be liable in this action. That the act was done wilfully by the post-boys there can be no doubt. Now the defendant was on the box at the time, and it is in evidence that one of the post-boys called out to the other, "Go in there," which was an intimation, clearly given to those on the box, of what was intended to be done; the defendant, therefore, must have been conscious of what the post-boys intended to do.

But the evidence does not stop there. After the misfortune, the defendant never suggests that it was the fault of the post-boys; neither on the spot immediately after the accident, nor afterwards in his interviews with Mason, does he intimate that it was not his own fault. On the contrary, he makes a statement that shows he was aware of what the post-boys intended to do, and that he had a control over them. Under all the circumstances, therefore, I think the defendant is civilly responsible in this form of action; and that the rule must be discharged.

[61] GRESSWELL, J. :

I am also of opinion that this rule must be discharged. Some

of the matters in the cause may be considered as finally disposed of by the jury; namely, that a trespass was committed; that the plaintiff received an injury therefrom, and not by any fault of his own. The plea, I may observe, is rather of a singular character in this form of action, but it is not material to dwell upon that.

It has been reserved to the Court to say whether the defendant is liable in this action, not as a dry question of law, but as a mixed question of law and fact, under all the circumstances of the case. The present case is not, I think, affected by the cases of *Laugher v. Pointer* and *Quarman v. Burnett*, which turned on the liability of a party hiring a carriage or horses for the day, for the conduct of the driver. The great struggle in those cases was, whether the driver was to be considered as the servant of the party charged; and it was not sought, as here, to make the defendant liable as sharing in the act by which the accident occurred, but as a master for the negligence of his servant. The principle of those cases, therefore, has no bearing on an action of trespass; in which a party may be liable as a co-trespasser for the immediate act of another, though that other be not his servant. (His Lordship stated the facts of the case.) Under all these circumstances, it seems impossible to suppose that the defendant did not know that the post-boys were going to break into the line; he had time enough to reflect on what was going on, and he might, if he had thought fit, have stopped the proceeding. This view is confirmed by what the defendant said not only at the time, but afterwards at his chambers, to Mason, that he had intended to let him into the line again. But in order to do so, it is clear he must have first shut him out. All the facts, therefore, tend to *show that he sanctioned the act at the time that it was committed.

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Rule discharged.

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(4 Man. & G. 68—94; S. C. 4 Scott, N. R. 682; 1 Dowl. N. S. 730.)

Assumpsit. The first count was upon a contract to sell and deliver sound tares; breach, that the tares delivered were unsound. The second count was upon a promise properly to ship the tares; breach, that they were improperly shipped, and thereby damaged. Plea to these two counts, that the plaintiff had impleaded the defendant in a foreign Court for not performing the identical promises in the first and second counts mentioned, and that the said Court had adjudged that the plaintiff had no cause of action in respect of the non-performance of the said promises; and that such judgment was final and conclusive.

In support of this plea a judgment of the foreign Court was produced,

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April 27.

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“ that the plaintiff be barred of his claim against defendant, on account of a cargo of tares, received by the ship *M. S.*” From a statement of “ reasons ” appended to this judgment, and which was in fact a statement of the case, it appeared that part of the tares contracted for had reached the plaintiff ; that he refused to accept them by reason of their unsound condition ; that he had sold them under protest ; and that he had instituted that suit to rescind the contract and recover back the money from the defendant ; but that he was barred by lapse of time, having brought the suit too late by the law of the country (Prussia) in which the Court sat, and in which the goods were shipped, and in which the defendant resided.

Held : first, that the judgment did not support the plea, inasmuch as it clearly was not applicable to the cause of action contained in the second count.

Secondly, that the plea could not be taken divisibly, so as to be considered as applicable to the first count only.

Thirdly, that, under the circumstances, the Court, having the powers of a Judge at Nisi Prius, ought not to amend the plea by stating that the judgment was in respect of the promise in the first count only.

Quære, whether the judgment was applicable even to the cause of action contained in the first count.

ASSUMPSIT. First count, that on &c. it was agreed between the plaintiff, then residing in London, and the defendant, then residing in parts beyond the seas, to wit, at Königsberg, in the kingdom of Prussia, that the plaintiff should purchase of the defendant, and that the defendant should sell and deliver to the plaintiff, for the purpose of being shipped and conveyed to London aforesaid, a certain large quantity, to wit, 100 lasts of seeds, to wit, tares, at a certain price then agreed upon between them, to wit, the price of 18s. per imperial quarter, free on board in the spring, the said tares to be large, sound, good Königsberg seed tares, of the growth of the year 1836, and of the *best quality. (The remainder of the agreement as set out in the declaration relative to the mode of payment, was not material to the point decided.)

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Averment : that 100 lasts of tares are equal to a certain large quantity, to wit, 1,050 imperial quarters, or thereabouts. Mutual promises. Averment of payment by the plaintiff in the manner stipulated, and performance of the agreement on his part, and that although the defendant did afterwards, to wit, on &c., in part performance of the said agreement, ship and deliver on board a certain vessel provided by the defendant for the plaintiff, to wit, the *Mary Swan*, at a certain port, to wit, at Königsberg, in the kingdom of Prussia aforesaid, a certain large quantity, to wit, 917 quarters of tares, for the plaintiff ; and although the tares so shipped as aforesaid, did afterwards, to wit, on &c. arrive at London aforesaid ; yet the defendant, disregarding his said promise, did not nor would ship the said tares free on board the last-mentioned vessel, and

did not nor would sell and deliver to the plaintiff sound good seed tares of the growth of 1836, and of the best quality; but on the contrary thereof, the said tares, at the time of their said delivery and shipment in and on board the said vessel, and on their arrival in London aforesaid, to wit, on &c. were,—as the defendant at the time of the said shipment and delivery well knew, but which the plaintiff did not discover until the day and year last aforesaid,—very soft, heated, discoloured, mouldy, rotten, decayed and wholly unfit to be used as and for seed tares, or for any other purpose, and were not of the growth of the year 1836, and thereby, and by means of the premises, the same became and were utterly useless to the plaintiff; contrary to the terms of the said agreement and of the promise of the defendant by him so made as aforesaid.

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Averment: that in consequence of the defendant's said breach of his said agreement, the plaintiff has not *only lost and been deprived of the advantage, profit and gain which he would and ought to have made, if the defendant had performed his said agreement, but hath been deprived of the use and interest of his said moneys, which, in pursuance of his part of the said agreement, he so paid to the defendant as aforesaid, and hath also been put to great charges and expense of his moneys, and been forced and obliged to lay out and expend a large sum of his money, to wit, 1,000*l.*, in and about the insurance of the said tares, and in and about shipping the same on board the said vessel at Königsberg aforesaid, and conveying the same to England, and in and about the necessary surveying and ascertaining the state and condition of the said tares on their said arrival in London as aforesaid, and in landing and selling the same under protest, to wit, on &c. Of all which premises the defendant has, at all times, had due notice.

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Second count, that on &c., in consideration that the plaintiff, at the request of the defendant (1), had agreed to become the purchaser of the said tares, as in the preceding count mentioned, he, the defendant, promised the plaintiff, that he, the defendant, would superintend the shipping and loading of the said tares, to wit, at Königsberg aforesaid, and would take and use every reasonable and proper precaution in seeing that the same were properly shipped and stowed in and on board a fit and proper vessel, or fit and proper vessels, in that behalf, for the conveyance of the said tares to London aforesaid; yet the plaintiff in fact saith, that

(1) The request appears to be immaterial, as an agreement to purchase contains in itself sufficient consideration.

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although he, the plaintiff, in all things duly performed his said agreement as in the preceding count mentioned, and although a large quantity, to wit, 917 quarters of *the said tares, was afterwards, to wit, on the day and year aforesaid, under the several agreements in the preceding count mentioned, and with the privity, knowledge and sanction of the defendant, and at his instance, shipped and loaded for conveyance thereof to London, in and on board a certain vessel bound to London, which afterwards, to wit, on &c. there arrived with the said quantity of tares on board thereof; yet the plaintiff in fact saith, that the defendant disregarded his last-mentioned promise in this, to wit, that he, the defendant, did not, in any manner, according to his said promise, superintend the shipping of the same tares, or take or use any precaution whatever in or towards seeing that the same were properly shipped or stowed in or on board a fit or proper vessel, or fit and proper vessels, in that behalf, but wholly neglected and failed so to do, and on the contrary thereof, the same vessel, in and on board of which the same 917 quarters of the said tares were so shipped and loaded as aforesaid, at the instance of the defendant, to wit, by reason of her having on board too great a cargo, and by reason of the state, size, condition and circumstances of the same vessel, was on the occasion aforesaid a very unfit and improper vessel wherein to ship or stow the same tares, as the defendant at the time well knew; and the plaintiff further saith, that the said 917 quarters of tares were, with the privity and at the instance of the defendant, shipped and stowed in and on board the same vessel in a very careless, negligent, improvident, unusual and unmerchantlike manner, and by means of the premises, the said 917 quarters of the said tares became and were so heated, mouldy, soft, rotten, discoloured and decayed, that the same and every part thereof became, were and was wholly useless and lost to the plaintiff; whereby the plaintiff not only has lost and been deprived of great gains and profits which he otherwise *might and would have derived and acquired by a resale of the same tares at high and advanced prices, but hath been deprived of the use and interest of the said purchase-money thereof, and hath been also put to great charges and expenses of his moneys, altogether amounting to a large sum of money, to wit, 1,000*l.* in and about the shipping of the said tares, and in insuring the same against perils of the sea, and in and about the conveying of the same to England, and in and about the necessary surveying and ascertaining

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the state and condition of the same tares on their arrival at London aforesaid, and in landing and disposing of the same.

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There were also counts for money paid, for money received, and on an account stated.

Pleas : first, *non assumpsit*.

Secondly, (to the first count), traversing the bad condition of the tares.

Thirdly, (to the second count), traversing the shipment in an improper vessel.

Fourthly, (to the first and second counts), that before the commencement of this suit, and before the commencement of the proceedings next hereinafter mentioned, the defendant was resident in parts beyond the seas, to wit, at Königsberg, in the kingdom of Prussia, within the allegiance of the King of Prussia, and within the jurisdiction of a certain Court of judicature called the Royal Prussian Court of Commerce and Admiralty of Königsberg; and that afterwards and whilst the defendant was resident at Königsberg aforesaid, and before the commencement of this suit, to wit, on &c., the plaintiff impleaded the defendant in the said Court of judicature for not performing the very same identical promises, and each and every of them, as are in the first and second counts of the declaration in this action mentioned, and for the damages alleged to have been sustained by the plaintiff thereby; the same Court having jurisdiction *in the premises; and such proceedings were thereupon had in the said Court, that afterwards and before the commencement of this suit, to wit, on the 31st of May, 1839; a judgment or decree was pronounced by the said Court, whereby it was adjudged and declared that the plaintiff had no cause of action against the defendant in respect of the damages alleged to have been sustained by him the plaintiff through the non-performance of the said promises; and it was further ordered and decreed, by the said judgment or decree, that the plaintiff should pay the costs and expenses of the proceedings so had in the same Court in that behalf: which judgment or decree was not in any way reversed or made void. And the defendant says that the said judgment or decree was and is final and conclusive between the parties to such suit, as to the said supposed cause of action, in the country where the same was pronounced, to wit, in the kingdom of Prussia aforesaid; and that the plaintiff is precluded from all further litigation in respect of the same, and ought not further to importune or molest him the defendant in respect of such supposed cause of

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action so adjudicated upon by the said judgment or decree as aforesaid. Verification.

The plaintiff after joining issue upon the first three pleas, replied to the fourth plea, that no such judgment or decree final and conclusive between the parties to the suit in that plea mentioned, in manner and form as therein alleged, ever was pronounced by the said Court of judicature in that plea also mentioned, *modo et formâ* ; whereupon issue was joined.

At the trial before Tindal, Ch. J., at the sittings in London, after last Trinity Term, the following document, translated from the German, was given in evidence in support of the fourth plea (1).

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“ Sentence.

“ *In the Matter of Alexander Burn Callandar, of London, merchant and corn-factor, plaintiff, versus R. M. Dittrich, of Kœnigsberg, merchant, defendant.*

“ The Royal College of Commerce and Admiralty at Kœnigsberg, in Prussia, have, in their session of the 31st of May, 1839,—at which were present the Director, Mr. Privy-Councillor-of-Justice Stellter, and Becker, Henke, Burdach, Schrötter, Bittrich, Councillors of Commerce and of Admiralty, and Von Hippel, Referendary of the Supreme Court, deputed as Commissary,—conformably to the proceedings in the cause, declared as follows :

“ (1) That the plaintiff's claim of 780*l.* 10*s.* 1*d.* sterling, with interest thereon, from the 6th day of April, 1838, which he formed against defendant on account of (*bezüglich auf*, relating to) a cargo of 917 quarters of tares received in the year 1837 by the ship *Mary Swan*, commanded by ‘ G. Wright,’ master, be registered.

“ (2) That the agreement between the parties, that the plaintiff should abstain from recovering the 133 quarters of tares, which, according to the defendant's statement, were still lying here for the plaintiff, and that the defendant should be content to accept them, be hereby legally confirmed ; and,

“ (3) That plaintiff be condemned in the charges of the law proceedings.”

“ JUDICIAL REASONS.

“ A. B. Callandar, in London, in the beginning of 1837, ordered of R. M. Dittrich of this place, 100 lasts of large round Kœnigsberg

(1) The translation has been compared with the original ; but no correction has been made in anything

which could affect the judgment of the Court.

seed tares, best quality, which were to be free from any mixture of oats, pease and such objectionable grain and seed, at 18s. sterling per quarter, free on board, to be shipped in spring. Dittrich, *in his letter of the 18th of January in that year to Callandar, accepted this offer. Before the shipment took place Callandar recommended to Dittrich to have the tares shipped as early as possible, and in as small vessels as possible, to prevent heating. Next to this he ordered him to resell immediately half the quantity of the purchased tares,—about 500 quarters, if the cost price, clear of expenses, could be obtained; but should they be shipped, to give preference to an English vessel. The firm of Dittrich could not effect the sale, and consequently shipped 913 quarters, to an amount of 837*l.* 6s. sterling, on the 29th of April, 1837, per the *Mary Swan*, ‘G. Wright,’ master; and upon the 30th *idem* informed Callandar thereof; observing, moreover, that the remainder consisting of 133 quarters then was warehoused for his account with Dittrich.

“The purchase price for the quantity shipped of 913 quarters tares is paid in that manner, that Dittrich acknowledged to have received by accepted drafts 450*l.*, and that afterwards, on handing bill of lading, Callandar paid to Dittrich’s order 375*l.* 6s. sterling. As to the payment of 12*l.* for 300 dunnage mats, the parties have not yet agreed.

“The *Mary Swan* arrived in London on the 5th of June, 1837. Callandar examined the tares, and found they were in so bad a state that he thought himself entitled to refuse receipt thereof, and noted a protest through John Lise Venn, notary public in London, after that two corn factors had previously, as competent judges, or experts, declared the tares to be totally decayed. Immediately, and indeed on the 6th of June, Callandar informs Dittrich of his refusal to receive the tares; then on the 9th of June sent him the report of survey and protest, and again declared, that he declined the receipt of the tares, but had got the same landed and brought into a good and airy granary, *where the greatest care and attention would be taken thereof; and that he would also try in favour of Dittrich to procure an abatement or reduction in the duty. Now when Dittrich declined to indemnify Callandar anywise, and on the contrary, sent him brokers’ certificates, trying to prove by them that the tares had been fully worth the price charged at the time of their shipment, and that he had consequently performed his part of the contract, Callandar answered that he would, if Dittrich made no other disposition, sell the tares for Dittrich’s account, and would do so in

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"On the 29th of December, 1837, Callandar sent his account-sales and account-current to Dittrich, and demanded payment of his debt, but as Dittrich did not comply with such demand, Callandar, on the 10th of June in the year past, brought an action against him, thereby seeking :

"1. To condemn R. M. Dittrich to pay unto him, the plaintiff, instantly, the sum of 780*l.* 10*s.* 1*d.* sterling with running interest thereon, from the 1st April, 1838, under pain of incurring execution.

"2. To pronounce the plaintiff entitled to refuse receipt of those 133 quarters of tares lying still here, according to the defendant's statement, and

"3. To condemn the defendant in the whole of the said charges.

[*77] "Defendant has admitted the order having been given precisely as stated by the plaintiff, and has expressly allowed that a contract to furnish and deliver has been entered into; but he has also alleged that he has fulfilled his agreement, and therefore disputed, *in quali et *quanto*, the plaintiff's claim; with this qualification only, that he agrees that the plaintiff should not accept that portion of the tares which had not been sent away, whereby the second part of the action is disposed of.

"For the rest the defendant has principally opposed the plaintiff with the objection of prescription, and by reason of the sects. 343 (1) and 345 (2), Part 1, tit. 5, of the Prussian Code, for the dismissal of the cause of the plaintiff; the defendant contending, that according to the precept, Part 1, tit. 11, sect. 987, of the Prussian Code, after such delivery, all the rules of law which hold between buyers and sellers are to be observed between the contracting parties, and consequently the delivery of tares was fulfilled in the very

(1) Section 343 of the *Allgemeines Landrecht für die Preussischen Staaten* (General, or Universal Code of Laws for the Prussian States), part 1, tit. 5, runs thus: "The rights which belong to the purchaser of a thing, on account of natural defects affecting that thing, must be exercised—in respect of real property in the country (*Landgüter*) within three years—in respect of real

property in towns (*Städtische Grundstücken*), within one year—in respect of movable property (*Bewegliche Sachen*), within six months after it has been received."

(2) "If the purchaser (*Uebernehmer*), suffer these periods to elapse without a judicial complaint against a vendor (*Geber*), his right is lost."

moment of the shipment on board the vessel, sect. 128 (1) *loco citato*, and that at six months after the receipt of the goods, the party who ordered the goods (now to be considered as purchaser) has lost by lapse of time (2), his right of action in respect of any defect affecting the thing itself. Not only from the day of the delivery (29th April, 1837) but also from the day of the acceptance * (5th June, 1837) to the day of the commencement of the action (10th June, 1838), more than a year had elapsed, whereby the plaintiff's right of action was extinguished.

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"But eventually the defendant has alleged that the agreement of delivery on his part has been duly performed; as that is a matter which depends upon the state and condition of the tares when put on board, and not upon the state in which they arrived in London, and he is able to prove that the tares were shipped on board the vessel in that stipulated condition.

"With respect to this point he has entered upon his proofs, whereupon the *status controversiæ* has proceeded with an express postponement of the inquiry as to the amount of damage. Nevertheless the admittance of evidence respecting the state and condition of the tares at the time of their shipment has been suspended *per decretum*, at the special and concurrent request of both parties, according to which, there should previously, and in conformity with the sects. 68 and 75, tit. 10, Part 1 of the General Court Instruction, for the present be decided (be a decision) only upon the preliminary objection of prescription (2).

"The plaintiff endeavours to repel such objection, by alleging that because the transaction between the parties is an agreement of delivery, the objection of prescription (2) must fall to the ground. For the contract for delivery is a commercial contract, as to which, in the same manner as with all other commercial contracts, the particular rule prevails:

"That if one of the parties does not fulfil or perform his obligation, the other may, without being bound to bring an action for performance, withdraw from the contract or agreement, and

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(1) "The possession of a right to rescind or abandon (*eines Untersagungs-rechts*) is lost, if the other party has acquired the possession of the opposite right."—"Wenn der andere sich in den Besitz des entgegenstehenden negativen Rechts,—des Rechts etwas zu thun,—gesetzt hat." Part 1, tit. 7, sect. 128.

(2) *Verjährung*. "*Verjährung*" (which answers the purpose of the "limitation of actions" in English law) is, by the Prussian Code, defined to be "an alteration in certain rights resulting, by the provisions of the law, from the non-exercise of those rights for certain fixed periods." Part I., tit. 9, sect. 500.

CALLANDAR claim indemnification, sect. 878, I. 11 (1), sect. 408, I. 5 (2) of the
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"From this the plaintiff infers, that he had a right to decline to receive goods which were not delivered in the stipulated state and condition, and by declaring his will and intention, to be disengaged from the contract; and that he has declared, most properly and distinctly, through his protest against the acceptance of the cargo. Now if this was regularly done on his part, and consistently with the Prussian law, there can be no idea of the goods having become his property; and if the defendant alleges the rule of law laid down in tit. II. sect. 128, *loco cit.* according to which, in contracts, the shipment of goods amounts to a delivery, it must be replied that such is the case only with contracts of purchase, but not with contracts of delivery, the difference from which appears from the different nature of both kinds of agreements. The purchase has respect to a special matter or thing, and the purchaser may express his acquiescence in the quality if he has an opportunity of inspecting it; therefore the assent of both parties, with respect to the thing delivered, does not exist before the receiver has expressed his satisfaction with *the commodity. Such consent is tacitly manifested by acceptance, which assent materially differs from the delivery, as sufficiently appears from the rules on Prescription, tit. 5, ss. 343 (3) and 344 (4); and therefore, where acceptance never took place, as in this case, there is no ground for contending that the period of limitation has begun to run."

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"Interpreter's Remarks.

("The narrative of the facts having thus been given (as usual in the Prussian judgments), and the quotations and opinions of both mandatories (called commissary of justice in Prussia, synonymous with, and joining the functions of, solicitor, attorney, lawyer, advocate, notary) stated, the Judges now, in their sentence, enter

(1) By sect. 878 of the 11th title of the first part of the Prussian Code, "if one party refuse the promised performance, the other may immediately abandon the contract"—"*von dem Vertrage sofort zurücktreten.*"

(2) By the 408th section of the fifth title of the first part of the Prussian Code, "In agreements, the principal subject of which is a commercial transaction, the party who asserts

that the other has not fulfilled the contract according to its terms, or that he is unable so to perform the contract, may thenceforth, but at his own risk, (*auf seine Gefahr*) abandon the contract."

(3) *Supra*, 470, note (1).

(4) Which section prescribes shorter periods of limitation in respect of extrinsic defects.

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into a special inquiry on the nature of the agreement, merely to ascertain (as they say), where the tares were to be delivered, and when the same have become the property of the plaintiff. For this reason, they have referred to certain extracts of letters, (the dates of the letters follow); and as to the nature of the agreement, they consider this indifferent, both parties having agreed that it should stand as a contract of delivery. Now, as it would be useless to repeat and re-translate into English such extracts and arguments, which would tire and absent the English lawyer or Judge, the interpreter leaves that, and now enters upon the real grounds whereby the Judges justify their sentence or judgment.”)

“In the case now lying before us, the agreement (sense of contract) was clearly this, that the defendant had to deliver the commodity here in Königsberg *into the vessel for account and risk of the plaintiff; such follows, doubtless, from the correspondence between the parties as above referred to, by which the contract was settled.

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“The defendant had engaged to deliver a cargo for the plaintiffs, free on board here, and the plaintiff in his letters, 31st January and 30th March, left to the defendant the choice of a vessel, thereby, indeed, recommended to him the earliest possible shipment, and dividing of the whole quantity and shipping it in small vessels, that the danger of heating be lessened; and further stated that English vessels should be preferred, without, however, restricting the arrangements to be made as to the shipment, to either of the courses intimated; therefore defendant was fully entitled to make out the invoice as he did, expressing that he had shipped the tares upon order, and for risk of the plaintiff; he left to the latter to procure the insurance, and with respect to the same, only observed that he might mind (consider of) the risk of craft for the cargo between here and Pillau, and the plaintiff, in consequence of such invoice, thought himself bound to pay the balance of the said invoice.

“So, by the shipment of the tares on board the vessel, the delivery was effected, and the contract *in casu* performed on the part of the defendant. Had the vessel miscarried, and the cargo been lost, the loss of the tares would have touched the plaintiff or the underwriters.

“After fulfilled delivery, the rules on the agreement of purchase (s. 987, I. 11, of the Prussian Code (1)), are the only ones that may

(1) *Supra*, 470.

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be applied. Therefore the plaintiff was no longer at liberty to recede from the contract, as from the day of the completed delivery *of the tares into the vessel, the risk as well as the ownership thereof went over upon him ; and if he thought the tares defective on their arrival in London, he could then no more refuse the receipt of the same as from the delivery into the vessel. According to contract, the property had become transferred from defendant upon the plaintiff ; as to the deficiencies in promise (complaints in respect of badness of quality), the plaintiff was now only allowed to refer to the title arising from s. 198, I. 11, and s. 319, *seq.* I. 5 (1), *loco cit.* The protest could be of no use to him, as he had become the owner of the commodity, from the moment of shipment on board the vessel here.

“ Therefore, it is also without effect or influence when the plaintiff maintains, that if it be impossible to a purchaser on delivery, to ascertain of the quality before the receipt of the commodity, as on the one hand he may have such goods as are to be delivered abroad inspected or examined previous to and on the shipment taking place, and may suffer the goods to be shipped only in case they be found conform to agreement ; and, on the other hand, nobody is entitled to form any claim or right to himself, from the neglect of precautionary measures, under the pretext, that it has been impossible to him to express his mind upon the quality of the goods before the delivery of the same.

“ The defects in the article which the plaintiff complains of as being contrary to the stipulated quality, he is bound to establish, within the limited periods appointed by sections 343 and 344, Part I., tit. 5, of the Prussian Code, before a competent tribunal, to which the defendant is legally amenable.

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“ Such prescription commenced, according to s. 343, *from the day of receipt ; and after s. 344, from that of perceiving the deficiency.

“ Indeed, the first day is not to be considered identical either with the day of delivery—if we reflect upon such, as per s. 128, I. 11, *loco cit.*—of that of transmission—in this case, representing the day of delivery (which has been set forth so striking by Bornemann in his observations or ‘ Commentary on the Prussian Civil Law,’ par. 2, page 607, s. 99) : on the contrary, it may be assumed from the general principles upon prescription, as doubtless, that the

(1) Which sections contain a variety of provisions relating to defects in articles which have formed the subject of contracts.

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limitation should commence only from that day when the examination through the entitled (by the person entitled to the goods) could possibly take place, and, of course, from that day when the object was really taken possession of by him (went into his custody); wherefore, in order to point this out in s. 843, there has intentionally not been fixed upon the day of delivery, but on the day of receipt of the object, as the commencing moment of prescription.

"In consequence hereof, the prescription against the plaintiff in this cause first began from the arrival of the tares in London, when and where the same could be taken possession of by him, and he became enabled to inform himself of the alleged defect in quality.

"But also from this term,—being the 5th of June, 1837, until the day of commencing his action, on the 10th of June, 1838, the limitations for denouncing the claims upon warranty,—at the furthest six months, as prescribed by ss. 343 and 344, *loco cit.*, had long ago elapsed. The plaintiff consequently has lost his right of claim (s. 345, *loco cit.*).

"As to the 133 quarters which remained behind, the agreement of the parties, that the plaintiff renounces the receipt, and the defendant is consenting thereto, was to be and has been confirmed.

"The decision upon the point of law-charges follows *from s. 2, tit. 23, of the regulations upon law proceedings; which regulations are universally binding.

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"Issued under the seal entrusted to us, and the usual signature.

"Königsberg, on the 31st day of May, 1839.

(L. S.)

"Royal Prussian College of Commerce and Admiralty.

"Signed,

"STELLTER" (1).

Objections were taken on the part of the plaintiff to this judgment, on the ground that no libel or other proceedings were shown, and that no jurisdiction of the Court was proved. All objections to the judgment were reserved by the LORD CHIEF JUSTICE for the consideration of the Court; and a verdict was found for the plaintiff on all the issues but the third, which applied to the second count.

(1) There followed a certificate by a "sworn public translator to the Royal Court of Königsberg in Prussia, that the foregoing translation thoroughly renders the true sense and meaning of the original judgment, in German, of the Royal Court of Königsberg." To this is subjoined the original judgment, under which the English consul

certifies that "the above signature (Stellter) is the proper handwriting of Mr. Stellter, Director of the Royal Prussian Court, called 'College of Commerce and Admiralty;' and that unto all acts and writings so signed by him, in that quality, full faith and credit is, and ought to be, given in Courts of justice, and elsewhere."

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A rule *nisi* had been obtained by the defendant in last Michaelmas Term, to enter a verdict for him on the fourth issue (1) (being the issue raised by replication to the fourth plea), and a cross rule was obtained by the plaintiff, to enter judgment *non obstante reredicto*, for him, in case the defendant's rule should be made absolute.

Channell, Serjt., and *Byles*, on the part of the plaintiff, now showed cause against the former rule :

[*85] The *onus* *lies on the defendant, to show that the foreign judgment is in respect of the same causes of action as those set forth in the first and second counts. It is contended on the part of the plaintiff, that it is certainly limited to the cause of action in the first count, even if it embraces that. There is nothing in the judgment to show, that the plaintiff attempted to enforce a claim in respect of any neglect of duty, or of any breach of contract giving rise to a duty. The suit in the foreign Court was for a liquidated sum ; here the action is for damages, which is a very different cause of action. The plaintiff was the purchaser, and the defendant the seller of certain tares. In the foreign Court, it appears that the plaintiff contended there had been no delivery to him so as to vest the property in him ; he received them under protest, and insisted that the property was still in the defendant, and prayed the Court to rescind the contract. In the present action the plaintiff in the first count assumes the delivery to him and acceptance by him, and sues the defendant for the damage that has accrued to him, by reason of the tares being inferior to those contracted for. In the second count he states, that the defendant took upon himself a duty, viz., that the goods should be shipped in a proper manner, and there is clearly nothing in the foreign judgment to show that the defendant was relieved from that liability. Besides, if the plea does not import that the judgment in the foreign Court was upon the merits, it would be bad as containing no answer to the action. If it is to be taken as importing a judgment on the merits, then it is not supported by the evidence, as the document produced was merely to the effect that the remedy was lost by lapse of time, as in the case of our Statute of Limitations, not that the right of action was destroyed. The mere loss of a remedy in another country will be no bar to a right of action in this ; as (even supposing the contract to *have been made in Prussia, which is denied), the *lex loci*

[*86]

(1) The rule was drawn up for the third issue, but this appears to entering a verdict for the plaintiff on have been an error.

solutionis must prevail over the *lex loci contractus*: *The British Linen Company v. Drummond* (1); *Huber v. Steiner* (2); Story, on the Conflict of Laws (3); *Don v. Lippman* (4). The libel and other proceedings would probably have shown what really were the causes of action in the foreign Court (5).

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Bompas, Serjt., in support of the rule obtained by the defendant :

The question, whether the foreign judgment included both of the causes of action set out in this declaration, was for the jury. The present objection was not raised at the trial ; it was there taken for granted that the causes of action were the same in both cases, and the defendant ought not now to be called upon to argue this point.

(TINDAL, Ch. J. : It was distinctly understood that all objections to the judgment, were reserved for the consideration of the Court.)

The judgment sufficiently shows, that the action abroad had reference to both of the causes of action relied upon in the present action ; the whole contract was before the Court in Prussia. In order to raise the present objection, the plaintiff ought to have replied, that there was no such judgment as that stated in the plea, as to the cause of action in the second count mentioned. The legal effect of the plea is to refer to the cause of action in each count, and therefore it may be taken distributively. Or, if the Court entertain any doubt upon this *point, having the same power as the Judge at Nisi Prius, they may amend the plea by inserting that the judgment applied to the cause of action in the first count only. [*87]

The effect of the judgment however is, that the plaintiff's whole right of action is utterly gone. It may be admitted, that the judgment does not say that the plaintiff never had a right of action, but it says that he had lost that right ; and decides, therefore, that he had no cause of action at that time.

- (1) 34 R. R. 595 (10 B. & C. 903).
 (2) 42 R. R. 598 (2 Bing. N. C. 202 ; 2 Scott, 304).
 (3) P. 839, 2nd ed.
 (4) 47 R. R. 1 (5 Cl. & Fin. 1).
 (5) They also argued upon the objections taken at the trial as to the absence of proof of jurisdiction in the foreign Court, and the effect of not setting out all the proceedings. The arguments upon these points are omitted, as the judgment of the Court was confined to the point reported in the text. The following authorities were cited: *Buchanan v. Rutter*, 9 R. R. 531 (1 Camp. 63 ; 9 East, 192) ; and *Obicini v. Bligh*, 34 R. R. 730 (8 Bing. 335 ; 1 Moo. & Scott, 477).

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I am unable to get over the first difficulty that has been urged against the defendant in this case. The Court are to consider themselves in the same situation as the Judge at the trial ; and on perusing the judgment which was produced, it does not appear to me to be the same judgment, in effect, as that on which the defendant has relied. The plea put upon the record is, “ that the plaintiff impleaded the defendant in the Royal Prussian Court of Commerce and Admiralty of Königsberg, for not performing the very same identical promises, and each and every of them, as are in the first and second counts of the declaration in this action mentioned, and for the damages alleged to have been maintained by the plaintiff thereby.” The plea then proceeds to state, that “ a judgment or decree was pronounced by the said Court, whereby it was adjudged and declared that the plaintiff had no cause of action against the defendant in respect of the damages alleged to have been sustained by him, the plaintiff, through the non-performance of the said promises ; ” and that such judgment was final and conclusive. This plea, therefore, professes to be an express answer to each of the specific *gravamina* set forth in the declaration. The issue raised by the replication is, “ that no such judgment or decree, final and conclusive between the parties to the suit in *that

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plea mentioned, in manner and form therein alleged, ever was pronounced by the said Court.”

The judgment produced in evidence appears to have been given in a cause concerning a claim for a specific sum of money made by the plaintiff against the defendant “ on account of a cargo of 917 quarters of tares received in the year 1837, by the ship *Mary Swan*, commanded by G. Wright, master.” Now the first count in the declaration is for the breach of a promise by the defendant, that he would deliver to the plaintiff a certain quantity of tares at a certain fixed price ; and that the said tares were to be “ large, sound, good Königsberg seed tares, of the growth of the year 1836, and of the best quality ; ” and the breach alleged is, that the defendant did not deliver to the plaintiff tares of the quality agreed upon, but that the tares delivered were “ very soft, heated, discoloured, mouldy, rotten, decayed and wholly unfit to be used as and for seed tares, or for any other purpose, and not of the growth of the year 1836.”

Now it is by no means clear that the judgment in the Prussian Court relates to the same cause of action as that mentioned in the first count. But without considering that point, let us see what is

the contract alleged in the second count of the declaration. That count states that the "defendant promised the plaintiff that he, the defendant, would superintend the shipping and loading of the said tares at Königsberg aforesaid, and would take and use every reasonable and proper precaution in seeing that the same were properly shipped and stowed in and on board a fit and proper vessel, or fit and proper vessels, in that behalf, for the conveyance of the said tares;" and then alleges, as a breach, that the defendant did not "superintend the shipping and loading of the same tares, or use any precaution whatsoever in or towards seeing that the same were properly shipped or stowed in or on board a fit or proper vessel, or fit or *proper vessels, in that behalf;" and that "on the contrary thereof, the vessel, in and on board of which the same 917 quarters of the said tares were so shipped and loaded as aforesaid, at the instance of the defendant, by reason of her having on board too great a quantity of cargo, and by reason of the state, size, condition and circumstances of the same vessel, was on the occasion aforesaid, a very unfit and improper vessel wherein to ship or stow the same tares, as the defendant at the time well knew." And the plaintiff then alleges that the tares were damaged by reason of their having been so improperly shipped.

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Now, if for a moment it were supposed that this second count contained the sole subject of action in this case, could it be said that the judgment was for the same cause of action as that upon which the plaintiff had declared? Could we have seen our way, without parol evidence to show that the judgment produced applied to the damage alleged to have been sustained by the plaintiff, in consequence of the improper shipping and stowing of the tares? I think it clear we could not; and therefore that, upon this point, there is a variance between the proof and the allegations on the record.

To this, one answer that is attempted to be set up is, that the plea may be severed, and treated as applicable to the first count only; but to this I reply that, though true it is, that some pleas are in their nature severable and distributive,—as, for instance, where there are several counts in assumpsit, the general issue may be distributed and considered applicable to each count, so as to meet the finding of the jury upon the different issues that may be raised;—yet that, where, in answer to the whole action, a document is produced—which, though not indeed a record according to our law, is still a solemn proceeding in a foreign Court, evidenced

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by the seal of that Court—we cannot say that a plea, which sets up *that document as an answer to the whole action, is divisible, and take it as applicable to one part of the action only. Then again, it is said that we might amend the plea in this case. But I do not think we could amend the issue so as to make the plea apply to the first count only, and thereby occasion a different set of issues. Upon the whole, therefore, I think the verdict must be entered for the plaintiff upon this issue, as the defendant has failed to make it out affirmatively.

COLTMAN, J. :

The answer set up by this plea is, not that there was no reasonable cause of action in justice or honesty on the part of the plaintiff; it is merely in the nature of a technical answer, and therefore it ought, I think, to be strictly proved. On the best consideration I have been able to give this case, it appears to me, that the suit in the Court of commerce at Königsberg, was not brought for the same cause of action as the action now before this Court. The proceedings in the foreign Court appear to be either very imperfect in their nature, or not to be fully before us. The suit in the Prussian Court seems to be rather for the rescission of the contract; while the present action is for damages resulting from a breach of that contract. Now it seems clear that a party may not be entitled to rescind a contract, and yet may be entitled to an action for the breach of it. Upon this ground, therefore, I think the plea is no answer to this action.

With respect to the point that has been raised as to the amendment of the plea, I think that no favour or stretch of authority is to be shown, or made on behalf of a party who is seeking to withdraw his case from our jurisdiction; and that if we even had the power to amend, we are not called upon to exercise it in this case, or to make any extraordinary exertion on his account.

[91] Upon the whole, I think the defendant has failed on this issue, and that the rule for entering the verdict for him thereon must be discharged.

ERSKINE, J. :

I am of the same opinion. In discussing this question I think we have nothing to do with what the effect of the foreign judgment may be in this country. The issue is, whether such judgment, as stated in the plea, is final and conclusive between the parties, as to

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the two causes of action mentioned in the two counts in the declaration. If the defendant had made that out, in point of fact, he would undoubtedly have succeeded; and the *onus* lay upon him to show that there had been a final and conclusive judgment such as he alleges. It does not appear upon the record in this action, that the foreign judgment operated as a bar by limitation. It is pleaded as a final and conclusive judgment between the parties. The question then is, whether the defendant has made out the affirmative of this issue. Even assuming that the foreign judgment put in evidence is a final and conclusive judgment, the question still is, whether it is such a judgment as is mentioned in the plea, namely, a judgment as to the identical causes of action mentioned in the first and second counts of this declaration. Now we must look to the judgment and see if it is what it is alleged to be. I confess it does not appear to me a judgment for either of these causes of action. The suit in the foreign Court appears rather to be founded upon a promise by the defendant to repay the plaintiff a sum of money; which is a very different cause of action from either of those set forth in the first two counts of this declaration. But that is not the ground of objection. The plea states a judgment recovered in respect of two distinct promises; the judgment appears to be in respect of one promise only, and to have no reference *whatever to any agreement or duty on the part of the defendant with regard to the shipment or stowage of the tares. The judgment, therefore, does not in my opinion support the plea, inasmuch as it appears to be for, at any rate, a very different cause of action from that set forth in the second count of this declaration.

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The next point is, whether or not we can take this plea distributively, so as to apply it to the first count only. But the defendant was bound, I think, to state the legal effect of the judgment, and he states it as applicable in law to both counts in the declaration. For the reason just given, it does not however appear to me that the judgment can be considered as a bar to the cause of action mentioned in the second count. There is, therefore, a variance between the statement in the plea, and the legal effect of the document produced to support it.

We are then asked to amend the plea; but I think we ought not to do so. I agree with my brother COLTMAN that it would be unjust to do so in a case where there is no real answer put forth upon the merits. And even if we did amend, the plaintiff must have the opportunity of raising the question, whether the foreign judgment

CALLANDAR v. DITTRICH. is conclusive as a bar to an action in this country; and I think, for such a purpose, we ought not to assume a power which it is by no means clear that we possess.

CRESSWELL, J. :

I quite agree that the present rule for entering a verdict for the defendant on this issue must be discharged.

[*93] A distinct question is raised by the issue, whether there has been any final and conclusive judgment between these parties delivered by the Court of Commerce in Prussia, on the causes of action in the first and second counts in this declaration. I cannot myself see *that the judgment was in respect of either of those causes of action. With regard to the first count, it may be that there was, or that there was not, such a judgment; all that I say is, that I do not myself see that there was. Looking at that which was properly the judgment produced, it speaks of the claim of the plaintiff against the defendant, "on account of a cargo of 917 quarters of tares received in the year 1837, by the ship *Mary Swan*" (1); but this is so vague and uncertain, that I cannot say what was the nature of that claim, or what the object of that suit; it may have been to rescind the contract, or it may have been for damages in respect of the nonfulfilment of the contract. To my apprehension, it is not clearly applicable to the cause of action in the first count of this declaration. Some years ago it was supposed in our Courts, that if an article sold did not correspond with a warranty, the purchaser might either rescind the contract, and sue the vendor for the recovery of the purchase-money, in an action for money had and received; or sue for damages occasioned by the breach of the contract (2). Now, it rather appears, that this suit in the foreign Court was something of the former class; for in what is set out in the document produced as an appendage to the judgment, and called the "Reasons" of the Court, it is stated that when the *Mary Swan* arrived in London, the plaintiff "examined the tares and found they were in so bad a state, that he thought himself entitled to refuse the receipt thereof;" and immediately afterwards he informed the defendant "of his refusal to receive the tares," "and repeatedly declared that he declined the receipt of the tares;" and then it further appears, that one of the points upon which the plaintiff prays judgment in the *foreign Court, is that he may "be

(1) *Ante*, 468.

(2) *Vide Street v. Blay*, 36 B. R. 626 (2 B. & Ad. 456).

entitled to refuse receipt" of the tares. It seems, therefore, that this suit was to rescind the contract, rather than a suit for damages.

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But even supposing that this judgment does apply to the cause of action set forth in the first count, we must then look to the second count; and there is clearly nothing in this judgment, that points to any negligence in shipping the tares, which is the cause of action in the second count. The plea says, the foreign judgment goes to the whole cause of action; but when it is produced, it does not appear to do so; it does not therefore support the allegation in the plea.

But then it is said, that the Judge at Nisi Prius might have amended, and that the Court, being considered in the same situation as the Judge, may also exercise that power; but we can only amend as to the variance, by altering the statement in the plea, that the foreign judgment was for both of the causes of action mentioned in the first and second counts. If we did so, however, we should only make it a bad plea; for it would then be pleaded to both counts, and would, on the face of it, apply only to one.

Rule discharged.

STURTEVANT v. FORD (1).

1842.
April 22.

[101]

(4 Man. & G. 101—106; S. C. 4 Scott, N. R. 668; 11 L. J. C. P. 245.)

A plea by the acceptor of a bill, to an action by the indorsee, that the bill was accepted before it became due, at the request and for the accommodation of J. S., and without any value or consideration for the acceptance or for the payment; and that the bill was indorsed to the plaintiff after it became due, is bad.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange drawn by J. Ayres for 248*l.* 7*s.* 8*d.*, dated 17th of August, 1838, payable in London (2), for value received in iron.

Fourth plea, that the bill was accepted by the defendant before the same became due or payable, at the request and for the accommodation of Ayres, and without any value or consideration whatever for the acceptance thereof or for the payment thereof; and that the said bill was so indorsed to the plaintiff as in the said declaration

(1) Cited in *Ex parte Swan, Re Overend, Gurney & Co.* (1868) L. R. 6 Eq. 344, 359: see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 36 (2). —A. C.

(2) As to the effect of the insertion of the words "in London" in the

body of the bill, see *Selby v. Eden*, 3 Bing. 611, 11 Moore, 511; *Fayle v. Bird*, 6 B. & C. 531, 9 Dowl. & Ry. 639, 2 Car. & P. 303; *Gibb v. Mather*, in error, 34 R. R. 688 (8 Bing. 214, 2 Cr. & J. 254, 2 Tyr. 189, 1 Moo. & S. 387).

STURTEVANT mentioned, two years after the same had become due and payable, according to the tenor and effect thereof. Verification.

FORD.

Special demurrer, assigning for cause, that it is not averred or shown in the said plea that the defendant accepted the said bill upon the terms that the same should not be indorsed or negotiated by Ayres after it became due; that the said plea does not allege that the plaintiff had notice of the premises or any of them in that plea mentioned, before or at the time the said bill was indorsed to him, or that the defendant ever required Ayres not to indorse the bill after it became due.

Joinder in demurrer.

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Channell, Serjt. in support of the demurrer :

The plea does not state that the plaintiff is not a holder for value, and it must be therefore taken upon the record that the plaintiff is a holder for value. Neither does the plea state that, before the plaintiff became the indorsee of the bill, he had notice that the bill was drawn for the accommodation of the drawer and without value. It does not show that the drawer was under any restriction as to indorsing a bill after it became due. The question to be decided upon the demurrer is, whether a holder for value taking a bill which is over due, without notice that the instrument is an accommodation acceptance, is not entitled to recover.

(CRESSWELL, J. : The question is, whether an indorser can give a better title than he himself has.)

In *Charles v. Marsden* (1) it was held not to be a sufficient defence to plead that the bill was accepted for the accommodation of the drawer without consideration, and indorsed to the plaintiff after it became due. In *Stein v. Yglesias* (2), it was pleaded that the bills were accepted for the accommodation of the indorser, and without any consideration for such acceptance. The plea was held to be bad, on the ground that it did not state that the bill had been accepted before it became due, and that there was nothing to show that the defendants intended to limit the negotiation of the bill to the time before it became due. The plaintiff would have his remedy over against the party accommodated. It lay on the defendant to show that the power of indorsing, and thereby raising money, was limited to the period during which the bill was running.

(1) 1 Taunt. 224.

Gale, Exch. Rep. 98; 3 Dowl. P. C.

(2) 6 Tyr. 173; 1 Cr. M. & R. 565; 1 252.

The defendant is not entitled to notice of non-payment. *Tinson v. Francis* (1), which will be relied on for the defendant, was a case of gross fraud. STURTEVANT
r.
FORD.

Talfourd, Serjt., *contra* :

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This is a point of considerable importance. In *Tinson v. Francis* it was held that an indorser of a promissory note for value, who had received the note after it became due from an indorser who had not given value, could not sue the maker. * * *

TINDAL, Ch. J. :

Upon these pleadings the plaintiff must be taken to be a holder for value, without notice *of any defect in the title of his indorser. Upon the authority of the cases,—without saying what would be my opinion if the question were *res integra*,—I think the plaintiff is entitled to judgment. In *Charles v. Marsden* the plea stated, that, at the time of the indorsement, the plaintiffs knew that the bill had been accepted by the defendant for the accommodation of Atkinson, the payee ; that, therefore, was a stronger case than the present. I do not see much force in the argument, that the circumstance of the bill being overdue when it is indorsed puts the indorsee in the same position as the indorser, who, in the case of a bill drawn for his accommodation, cannot sue at all. I do not think that the holder is precluded from suing in all cases of accommodation bills indorsed after the time at which they purport to be payable. Nothing *dehors* the bill, as payment, &c. ought, I think, to affect an indorsee for value. In *Stein v. Yglesias* it was said, without disapprobation on the part of the Court, that the defendant was bound to allege want of consideration for the indorsement.

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COLTMAN, J. :

I am of the same opinion. In *Charles v. Marsden*, LAWRENCE, J. says, “ Where a party has obtained the bill by fraud, or where there is any prejudice to the drawer, those cases apply ; but, unless in instances of this kind, the acceptor is not relieved. This case may fall within some general expressions which have been used by the Court in giving judgment, but those expressions are always to be taken with reference to the cases to which they were applied. One was a case of clear fraud, another was a smuggling transaction. In the present case, it is to be supposed that the party persuades a

STURTEVANT friend to accept a bill for him, because he cannot lend him money.
 FORD. Would there be any objection if, with the knowledge of the circumstance that this is an accommodation bill, some person should
 [*105] *advance money upon it before it was due? Then what is the objection to his furnishing the money on it after it is due? For there is no reason why a bill may not be negotiated after it is due, unless there was an agreement for the purpose of restraining it. But if there had been such an agreement, it should have been stated in the plea; and it might then have been a defence; but that is not so here. This bill, then, must be presumed to be given in order that the party may raise money on it in the ordinary way. I see nothing in the transaction prejudicial to the acceptor, and the plea is bad in substance."

ERSKINE, J. :

I am of the same opinion. It must be taken here that the plaintiff was a holder for value. The circumstance that the bill was overdue might have operated as evidence that the bill was an accommodation bill, but it should have been so averred. A jury might infer that the bill was accepted upon an understanding that it was not to be negotiated after it became due. But that would not be an inference of law; it should therefore have been made the subject of an averment. In the absence of such an averment, the question is, whether the mere fact of the bill being an accommodation bill prevents it being negotiable after it becomes due. It is said that a bill indorsed after it becomes due, is taken by an indorsee subject to all the equities. The question is, whether the matter of defence set up, is an equity which attaches to the bill. The drawer of this bill could not sue the acceptor. If the plaintiff has given consideration there is no equity to attach to him. Then is this an equity with which the bill is encumbered? It seems to me that no equity attaches to the bill; because it was placed in the hands of the drawer, for the very purpose of raising money. Looking at the cases of *Charles v. Marsden* and *Stein v. Yglesias* I
 [*106] think the *plaintiff's right to recover is not concluded by the facts disclosed in this plea.

CRESSWELL, J. :

I am of the same opinion. Had this been *res integra*, I am not prepared to say that I should have come to the same conclusion. I should have thought it a case of doubt. By the law merchant,

an indorsement may give to the indorsee a better title than the indorser had. It is said that the indorsee of a bill which is over due, takes it subject to all the equities; perhaps a better expression would be that he takes the bill subject to all its equities. That brings it to the question, whether this is an equity which attaches to the bill. In *Charles v. Marsden* the Court said, that there was no reason why a bill should not be negotiated after it became due, unless there was an agreement for the purpose of restraining it. *Attwood v. Crowdie* (1) is consistent with the law as laid down in *Charles v. Marsden*.

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FORD.

Judgment for the plaintiff.

BULMER AND OTHERS v. GILMAN AND OTHERS.

(4 Man. & G. 108—126; S. C. 4 Scott, N. S. 781; 11 L. J. C. P. 174.)

A Parliamentary agent, entrusted with the passing of a local bill through Parliament, who puts a construction on an order of the House of Lords which is doubtful in its terms,—such construction being different from that which is adopted by the Standing Orders Committee and by the House, whereby it becomes necessary to abandon the bill,—is not guilty of such gross negligence as to disentitle him to recover a remuneration for his labour in passing the bill through the House of Commons.

1842.
April 30.
[108]

ASSUMPSIT, for work and labour, care and diligence, as attorneys, in and about soliciting and passing a certain bill in and through the Commons' House of Parliament, and in and about other businesses, &c. with counts, for money paid, and on an account stated.

Pleas; first, *non assumpsit*.

Secondly (to the first count), that the work and labour, care, and diligence by the plaintiffs done, performed, and bestowed for the defendants, as in the said first count mentioned, were by the plaintiffs done, performed, and bestowed in so careless, negligent, and insufficient a manner, that the same, from the time of the doing and performing thereof, and from thence until the time of the commencement of this suit, became and were, and from thence

(1) 1 Stark. N. P. C. 483. In that case Lord ELLENBOROUGH ruled, that the acceptor of accommodation bills may reclaim them in the hands of the indorsee of the party for whose accommodation they were accepted, if, at the time they fall due, the balance of accounts, as between the indorser and

the indorsee, to whom they have been remitted on account, be in favour of the indorser; but that, if not so reclaimed, the indorsee acquires a lien for subsequent advances made by him to the indorser; and the Court refused a rule for a new trial.

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hitherto have been, and still are, wholly useless and unbeneficial to the defendants; and the defendants, by and through such carelessness, negligence, and inefficient conduct of the plaintiffs, as aforesaid, derived no benefit whatsoever from the same. Verification.

Thirdly (to the second count), that the sum, so paid by the plaintiffs for the use of the defendants, as in the second count mentioned, was money paid by the plaintiffs, for, in, about, and in respect of, work and labour by the plaintiffs done and performed for the defendants; and that such work and labour were done and performed by the plaintiffs in a careless, &c. (as in last plea); and from which last-mentioned work and labour, and the money paid by the plaintiffs, for, in, about and in respect thereof, by and through such carelessness, *negligence and ignorance of the plaintiffs as aforesaid, the defendants had derived no benefit whatever. Verification.

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Replication (to the second and third pleas), *de injuriâ*.

At the trial before Tindal, Ch. J., at the Middlesex sittings after last Michaelmas Term, the following facts appeared :

The plaintiffs are Parliamentary agents; and the action was brought by them against the defendants, who were attorneys, residing in Norwich, for conducting a bill "for better paving, lighting and improving the city of Norwich and county of the same city," through the House of Commons, in the years 1888 and 1899. There were other Acts in existence for similar purposes, but their operation was confined to the city of Norwich.

The following are the standing orders of the House of Lords, made in 1888 as to private bills :

"Standing orders, the compliance with which must be proved before the Standing Orders Committee, in all bills for railways included in the second class, and in any other bill included in any of the three classes, which may be opposed; and before the committee on the bill, in any other case.

"1. That notices shall be given in all cases where application is intended to be made for a bill included in any of the three classes above mentioned.

"2. That such notices shall be published in three successive weeks in the months of October and November, or either of them; and in the case of such railway bills as are included in the second class, in lieu of *those months, twice in the month of February, and twice in the month of March, immediately preceding the Session

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of Parliament in which application for the bill shall be made, in the *London, Edinburgh, or Dublin Gazette*, as the case may be, and in some one and the same newspaper of the county in which the city, town, or lands to which such bill relates shall be situate, or if there is no newspaper published therein, then in the newspaper of some county adjoining or near thereto.

“3. That if it be the intention of the parties applying for a bill to levy any tolls, rates or duties, or to alter any existing tolls, rates or duties, the notices shall specify such intention.

“4. That on or before the 31st day of December, immediately preceding the application for a bill, by which any lands or houses are intended to be taken, or an extension of the time granted by any former Act for that purpose is sought for, application in writing (and in cases of bills included in the second class in the form set forth in the appendix marked (A)) be made to the owners, or reputed owners, lessees, or reputed lessees, and occupiers, either by delivering the same personally, or by leaving the same at their usual place of abode, or, in their absence from the United Kingdom, with their agents respectively; and that separate lists be made of such owners, lessees and occupiers, distinguishing which of them have assented, dissented, or are neuter, in respect thereto” (1).

* * * * *

The three classes of bills referred to in the above orders, are as follows:

“1st Class. Bills for inclosing, draining, or improving
lands * * * *

for paving, lighting, watching, cleansing, or improving cities or
towns. * * * *

relating to poor-rates, or the maintenance or employment *of the
poor; and bills for altering any Act passed for any of the said
purposes, except such bills as are included in the third class
of bills.

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“2nd Class. Bills for making, maintaining, varying, extending or enlarging any bridge, turnpike road, cut, canal, reservoir, aqueduct, waterwork, navigation, tunnel, archway, railway, pier, port, harbour, ferry or dock; and bills for altering or amending any Act passed for any of the said purposes, except such bills as are included in the third class of bills.

“3rd Class. Bills relating to county rates, gaols or houses of correction; * * * *

(1) Substantially reproduced in Standing Orders, 11 and 12, for 1903.—A. C.

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and bills to continue or amend any former Act passed for any of the purposes included in the two preceding classes, where no further work than such as was authorized by any former Act is proposed to be made."

The following notice had been prepared by the plaintiffs :

" Notice is hereby given, that application is intended to be made to Parliament in the next ensuing Session, for leave to bring in a bill to alter, amend, enlarge and repeal certain of the powers and provisions of an Act passed in the forty-sixth year of the reign of his late Majesty, King George the Third (1), intituled ' An Act for better paving, lighting, cleansing, watching and otherwise improving the city of Norwich.' And also of an Act passed in the sixth year of his late Majesty, King George the Fourth (2), intituled ' An Act for amending and enlarging an Act of his late Majesty, for better paving, lighting, cleansing, watching and otherwise improving the city of Norwich.' Dated this 8th day of November, 1838.

" CHAS. S. GILMAN, Solicitor.

" Norwich."

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But in consequence of a letter from one of the defendants, suggesting that this notice was insufficient by reason of its not stating that it was intended to extend the powers of the existing Acts to the hamlets, &c. in the county, and to levy rates on the owners and occupiers thereof, the notice was re-settled, and duly published, in the following form :

" Notice is hereby given, that application is intended to be made to Parliament in the next ensuing Session, for leave to bring in a bill to alter, amend, extend and enlarge the powers and provisions of an Act passed in the forty-sixth year of the reign of his late Majesty King George the Third, intituled ' An Act for better ' &c.. and also of an Act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled ' An Act for amending, ' &c.

" And notice is hereby also given, that it is intended to insert in the proposed bill a power for enabling the owners and occupiers of houses, lands and hereditaments, in the parishes, hamlets, liberties, precincts and places, within the county of the said city, to extend the powers and provisions of the said bill to the said parishes, hamlets, liberties, precincts and places, or to certain parts thereof.

" And notice is hereby further given, that it is intended, by the

(1) 46 Geo. III. c. lxxvii.

(2) 6 Geo. IV. c. lxxviii.

said bill, to take powers for raising money, for the purposes thereof, by rates on the owners and occupiers of houses, lands and hereditaments within the said city and county.

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“Dated this 8th day of November, 1838.”

On the 9th of March, 1839, the bill was read a first time in the House of Commons.

The preamble stated, that “Whereas an Act was passed in the forty-sixth year of the reign of King George the Third, intituled ‘An Act for better’ &c. And whereas an Act was passed in the sixth year of the reign *of King George the Fourth, intituled ‘An Act for amending’ &c.: and whereas the said recited Acts, so far as relates to the watching of the said city, have ceased, in consequence of a notice, given in conformity with the provisions of the Act for regulating municipal corporations in England and Wales (1): and whereas since the passing of the hereinbefore-first-recited Acts, the inhabitants in the suburbs of the said city, usually called the county of the city of Norwich,—which comprise eight parishes or hamlets, the liberty of the town-close, and parts of certain parishes, the residues whereof are within the said city,—have very greatly increased, and a large number of houses have been erected, and several new streets formed therein; and it would tend much to the comfort and convenience of the inhabitants, were the powers of the hereinbefore-recited Acts enlarged, and extended to the said suburbs: and whereas the powers and provisions of the said two several first hereinbefore-recited Acts have been found, in many respects, defective, and insufficient for the purposes intended; and it is expedient that the same should be repealed, and that other powers and provisions should be granted and made for better paving, lighting, cleansing and improving the said city and suburbs, and for removing and preventing nuisances and annoyances therein; but the same cannot be effected without the authority of Parliament,” &c.

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By sect. 62, the Commissioners were empowered to cause streets, &c. to be lighted with oil or gas; and by sect. 67 they were authorized to recover rents for gas (2).

Section 96 was as follows: “And be it further enacted, that for the purpose of making the narrow parts of the squares, crescents, terraces, roads, streets, *lanes, ways, passages, and places, safe and commodious for carriages and passengers, and for opening

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(1) 5 & 6 Will. IV. c. 76, s. 88.

them was not discussed on the motion

(2) These sections are not set out at length, as the question arising upon

for a new trial. See *post*, p. 497.

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proper communications between the said squares, &c. or any of them, and for stopping up unnecessary communications between the said squares, &c. or any of them, and for altering or widening any road or roads within the said city or county, and for altering, widening, and improving the present communications between the said squares, &c. or any of them, and for otherwise improving the said city and county, it shall be lawful for the said Commissioners to treat and agree with such person or persons, or body or bodies politic or corporate, spiritual or lay, respectively, as shall be or be deemed to be owner or owners of, or interested in any houses, buildings, erections, projections, encroachments, lands, tenements, or hereditaments, within the said city and county, as the said Commissioners shall think right and proper to be taken or used for the purpose of making such improvement, for the absolute purchase thereof respectively, or for any damage to be sustained by the proprietors thereof in effecting such improvement: Provided always, that nothing in this Act contained shall authorize and empower the said Commissioners to take or use any house, building, yard, garden, orchard, lawn, shrubbery, or plantation, without having previously obtained the consent of the owner or proprietor thereof."

By sect. 100, in case the parties were incapable to treat, the amount of satisfaction and compensation was to be settled by a jury.

By sect. 110, damages under 20*l.* might be settled by justices.

Section 117 was as follows: "And be it further enacted, that upon payment, or legal tender, of such money as shall have been agreed upon between the parties, or awarded by a jury or justices, in manner *aforesaid, for the purchase of any lands, or of any estate or interest in any lands, to the respective proprietors of such lands, or other person entitled, according to the provisions of this Act, to receive such money, within three calendar months next after the same shall have been so agreed upon or awarded, or whenever any of the respective cases shall happen, wherein such money, satisfaction, or compensation, is hereinbefore authorized or directed to be paid into the Bank of England, then upon payment into the Bank of England, in manner in such case hereinbefore authorized or directed, it shall be lawful for the said Commissioners immediately to enter upon such lands, and thereupon such lands, and the fee simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest, of all parties therein, paid or compensated for by such payment as

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aforesaid, shall thenceforth be vested in, and become the sole property of, the said Commissioners, to and for the purposes of this Act; and the said Commissioners shall not be bound to see to the application of any such purchase-money, compensation, or satisfaction; and such payment, or tender and conveyance, as hereinbefore mentioned, or such deposit in the Bank of England as aforesaid, shall not only bar all right, title, interest, claim, and demand, of every such party, but shall also bar all dower and all estates-tail and other estates in reversion and remainder, and all rights, titles, limitations, and trusts whatsoever, of and in the said lands so compensated and paid for as aforesaid: Provided nevertheless, that before such payment, tender, or deposit, in the Bank of England, as aforesaid, shall have been made, it shall not be lawful for the said Commissioners, or for any person acting under their authority, to enter upon such lands for any of the purposes of this Act, save for the purpose of surveying or valuing the same for the purposes of this Act, without *the previous consent of the owners and occupiers thereof respectively."

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The bill having gone through the different stages in the House of Commons, was, on the 24th of June, read there a third time, passed, and sent up to the Lords. In the House of Lords the bill was read a first and second time, and referred to the Committee of Standing Orders; and the following extracts from the journals of the House of Lords were given in evidence:

"Die Jovis, 18^o Julii, 1839.

"The Earl of Shaftesbury reported from the Lords Committees appointed to consider of the bill, intituled 'An Act for better paving, lighting, and improving the city of Norwich and county of the same city,' that the committee had met, and considered the said bill, and, in the first place, proceeded to inquire how far the standing orders of the House, relating to bills for the improvement of cities and towns, have been complied with on this bill; and had found that notices of the bill have been inserted in the county newspapers and in the *London Gazette*, and have been affixed on the church doors of the several parishes affected by the bill, within the period limited by the standing orders; but the committee had found that such notices did not contain any mention of the intention of taking power for lighting and improving certain parts of the town of Norwich within the county of the city of Norwich, without the consent of the owners and occupiers of such district; and that

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powers for that purpose are proposed to be taken by the present bill. The committee further found that powers for the compulsory purchase of houses and lands are contained in the bill, and that no application has been made to the owners, lessees, and occupiers, of such houses and lands, as is required by the standing orders.

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Under these circumstances the committee were of opinion *that it would be necessary to strike out of the bill all the provisions contained therein for the purpose of lighting and improving the parts of the town of Norwich within the county of the city of Norwich, without the consent of the owners and occupiers thereof, and for the compulsory purchase of houses and lands. Upon such opinion being intimated, certain petitions were presented to the House, praying to be heard by counsel against the bill and against the proposed alterations. The committee have, therefore, thought it right to direct the bill to be reported to their Lordships in its present state, and recommend to their Lordships to refer the said bill to the Standing Orders Committee, as an opposed private bill.

" Which report being read by the clerk,

" Ordered, that the said report do lie on the table.

" Ordered, that the said report, together with the bill intituled 'An Act for better paving,' &c., be referred to the committee appointed to consider how far the standing orders of this House relating to certain railway bills and opposed private bills, have been complied with on such bills."

The following extract from the proceedings of the Standing Orders Committee was also produced :

" Die Martis, 29^o Julii, 1839.

" The Earl of Shaftesbury in the chair."

* * * * *

It appearing from the said report that the notices of the bill, though given within the period limited by the standing orders, did not contain any mention, &c. (as in the report, *ante*, p. 493).

" After discussion,

" It is moved to resolve

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" That the standing orders have not been complied with on this bill, and that the committee do not recommend *to the House that the said orders should in this case be dispensed with.

" The same is, upon the question, agreed to."

And the following extract from the journals of the House :

“ Die Jovis, 25^o Julii, 1839.

“ The Earl of Shaftesbury reported from the Lords Committees appointed to consider how far the standing orders of the House relating to certain railway bills and opposed private bills have been complied with on such bills, and to report to the House, and to whom was referred the bill intituled, ‘ An Act for better paving,’ &c.; and to whom were also referred the report from the committee on the Norwich Improvement Bill, and the petition of R. J. Harvey, &c., owners of estates in the county of the city of Norwich, praying to be heard by counsel in support of the said bill, with leave to the petitioners to be heard by their agents in support thereof; that the committee had met and inspected the said bill, and had considered the said report, and also the said petition, and had inquired how far the standing orders of this House, relating to matters required to be done by parties promoting bills for the improvement of cities or towns previously to the second reading of such bills, have been complied with on this bill, and had found that notices of the bill had been inserted, &c. (as in the report, *ante*, p. 498): and the committee do not recommend to the House that the standing orders should in this case be dispensed with.

“ Which report, being read by the clerk, was agreed to by the House.”

In consequence of this report, the parties interested in the bill, not considering it expedient to proceed with it, abandoned it altogether.

The defence to the action, in substance, was, that the plaintiffs were chargeable with gross ignorance and negligence in not having prepared the notice as required by the standing orders of the House of Lords.

The LORD CHIEF JUSTICE, in summing up, directed the jury that the question they had to determine was, whether the failure of the bill arose from a culpable degree of negligence on the part of the plaintiffs, or whether they showed reasonable care and skill in that which they had to perform. His Lordship further observed, that the point to be considered was, whether the plaintiffs had comported themselves with due diligence, and with a proper degree of knowledge of those standing orders, which it was peculiarly their duty to carry into execution. For it was to be supposed that in the character in which they held themselves out to do business as

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Parliamentary agents, they were thoroughly conversant with all the particular facts, in carrying a bill through the House, necessary to insure its passing. His Lordship then commented on the standing order of the House of Lords, requiring application to be made to the owner or lessee of lands or houses; and said that it was undoubtedly a very proper clause, that if there was any bill which intended taking, by the force of the bill, any property belonging to any individual against his consent, he should have due notice of the bill before it was passed, in order that he might appear and make such opposition to the bill as he thought the justice of the case required. It was obvious that a notice would be necessary when specific property was intended to be taken; for instance, in a bridge bill, where, in order to make the access to the bridge more complete, it was requisite to take either a house or some portion of ground. His Lordship then applied similar observations to canal and railway bills, and bills for the alteration of a turnpike road. "In all these cases" (his Lordship observed)

[*120] "the Act *may be said to take away property from some person, and an omission to apply to that person, for his assent or dissent, would be a breach of the standing orders, and would import a gross degree of negligence on the part of the individual whose duty it was to see that such standing orders had been complied with. Therefore, if the intended Act has the same degree of reference to the standing orders as those others have, which I have mentioned, I should think it gross negligence on the part of these plaintiffs, who undertake the business of Parliamentary agents, if they had not themselves applied, or caused applications to be made by their agents in the country, to ascertain the assent or dissent of the parties whose property was so to be taken. But looking at this bill, I cannot help entertaining a very considerable degree of doubt, whether the fourth standing order can apply to this case. It is one question whether the parties have or have not had notice that Parliament may pass a bill which has such a clause in it; it is another and different question whether it lies within that precise standing order. The bill in question does not at all contemplate the taking of any one's land or property specifically; it only supposes that, in the course of events and of time, it may become necessary to widen some streets, and to alter their direction, for the purpose of improving the city; so that all the powers pointed out by the proposed statute were only given contingently,—if at some future time it should seem fit to exercise them. The question,

therefore, is,—there being no specific object in view and no particular person to whom notice could be given,—whether it was necessary to ask every man in the city who had property there, for his assent; for every man's property might possibly be affected." His Lordship then read the sections of the bill, observing that there appeared to be a mistake in the report of the committee in stating that there was a compulsory clause in the bill, for taking *houses and lands, inasmuch as there was no compulsory clause for taking houses at all; and his Lordship added, "I cannot help thinking that it is so extremely doubtful, whether the fourth standing order could apply to a case of this sort, that, at least, it would be a hard measure to say, that persons were guilty of gross negligence, if they did not understand that order in the way in which the defendants have sought to apply it."

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The jury returned a verdict for the plaintiffs for 548*l.*, being the sum they had paid out of pocket.

Channell, Serjt., in Hilary Term last, obtained a rule *nisi* for a new trial, on the ground of misdirection; against which,

Bompas, Serjt., now showed cause:

According to the resolutions of the Standing Orders Committee of the House of Lords, which were afterwards adopted by the House, the plaintiffs were considered not to have complied with the standing orders in two particulars; first, in respect to the notice as to lighting the town; and, secondly, as to the application to the owners of property under the clause relative to taking lands, &c. It is understood that no question is now raised upon the first point.

(*Channell*, Serjt. assented.)

Then the only question is, whether, because the plaintiffs have put a wrong construction upon the standing orders of the House of Lords, or rather a different construction from that which the House has adopted, they have been guilty of such gross negligence as to debar them from all right to recover a remuneration for their work and labour, or at any rate to be repaid the costs out of pocket. * * *

Channell, Serjt. in support of the rule:

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The point as to the other objection was left properly to the jury.

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With regard to both objections, there have been three *decisions against the plaintiffs; 1st, that of the committee appointed to consider the bill (1); 2ndly, that of the Committee of Standing Orders (2); and, 3rdly, that of the House of Lords (3); all showing that the plaintiff had put a wrong construction on the fourth order. The LORD CHIEF JUSTICE at the trial expressed a strong opinion as to the objection now under consideration, that the order did not apply to the bill in question; and the jury therefore, fettered by this direction, found that there had been no negligence on the part of the plaintiffs. It cannot be argued that the decision of the House of Lords was wrong in their interpretation of their own order; and it was the duty of the plaintiffs, as Parliamentary agents, to be acquainted with its meaning. It is not denied that the LORD CHIEF JUSTICE was bound to give an opinion upon the subject for the guidance of the jury.

(CRESSWELL, J.: Do you mean to say that there was any negligence imputable to the plaintiffs, beyond the fact of their not knowing that the bill would be affected by the order in question?)

No other negligence is imputed to them.

(CRESSWELL, J.: And you admit that my Lord was bound to give an opinion on that point.)

It need not have been so strongly expressed. It is submitted that the bill did fall within the fourth standing order. This is not a question about compulsory powers to take land; for it is true that no such powers are given by the bill; as all that is given is a power to treat with parties. But it is clear that this is a bill by which land is "intended to be taken." The rule would necessarily apply to all railway bills.

(CRESSWELL, J.: Not, in case no land was intended to be taken.

TINDAL, Ch. J.: Suppose a man made a railway through his own land, and an Act were required to enable him to take tolls, could it be said that the rule applied, and *that the party was bound to make an application to himself?

(1) *Ante*, p. 493.

(2) *Ante*, p. 495.

(3) *Ante*, p. 495.

ERSKINE, J.: The order says, "if lands are intended to be taken;" that condition overrides all the clause.)

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If there had been any provision in the bill as to taking any particular land, there could be no question but that the rule would apply; but the most unlimited powers were asked for as to taking land generally. There was no notice that any power to take land was given by the bill, and the safeguards required by the standing orders of the House were therefore entirely thrown aside. But the greater the powers sought for, the greater the caution necessary.

(COLTMAN, J.: What do you consider would have been a perfect compliance with the order in this case? That all the owners of property in the city should have been applied to?)

Yes; inasmuch as the promoters of the bill claim the right to take any part of such property.

(CRESSWELL, J.: What should they have asked them to assent to?)

To the exercise of the general power. At any rate the published notice should have specified what powers were sought to be obtained.

COLTMAN, J.:

It is true that this case was left by my Lord to the jury, accompanied by strong observations; but I think they were necessary from the peculiar circumstances of the case. He was called upon to state his opinion; and to my view he would have been wrong in not telling them, that, looking at this bill, he entertained considerable doubt whether the fourth standing order could apply to it. The observations of his Lordship, even assuming that a mistake had been committed by the attorneys, ought, in my opinion, to have been made to the jury; and, if upon the evidence submitted to their consideration they had found gross negligence on the part of the plaintiffs, I think their verdict must have been set aside.

ERSKINE, J.:

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I am of the same opinion. I think the construction of the standing orders of the House of Lords turned upon a question of

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law ; and, looking at the words of the order in question, it is, to my mind, exceedingly doubtful whether it would apply to this case. In leaving the case to the jury, it was not necessary for my Lord to give a decided opinion on the construction of the order : but the construction being doubtful, I think attorneys cannot be said to have been guilty of such gross negligence, in construing it as the plaintiffs did, as to defeat their right of action for business done. It is unnecessary to say whether the order does or does not apply in this case ; it is sufficient to remark that the words of the order are by no means clear, or at least so clear as to render the plaintiffs open to the charge of gross negligence ; and I agree that if the jury had arrived at such a conclusion—no particular land or property being directly required to be taken for the purposes of the intended Act—there would have been grounds for the Court to grant a new trial.

CRESSWELL, J. :

I also think that the rule ought to be discharged. There are two descriptions of negligence ; negligence in fact, and, what may be termed, negligence in law. If the plaintiff had neglected to give the notices required by the standing orders, that would have been negligence in fact ; if there had been negligence in the form of framing those notices, that might have been negligence in law. But that cannot be considered as gross negligence, concerning which persons of competent skill may entertain a doubt. The construction of a written instrument is a question for the Court ; it was for the Judge, therefore, at the trial, to say whether the construction of these orders of the House of Lords was so doubtful as to exonerate an attorney from gross negligence, who had put a construction upon *them, which turned out, according to the view taken by the committee of the House, not to be correct. Now I must say, I participate fully in all the doubts entertained by my Lord at Nisi Prius, as to the effect of these orders. Perhaps it might not be safe to say that the committee of the House of Lords were wrong in their conclusion ; it might possibly be considered an invasion of the privileges of the House ; but I certainly consider the point extremely doubtful, and if I had to try the case at Nisi Prius, I should direct the jury in the same manner. I think, therefore, that the direction and the verdict are both right.

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TINDAL, Ch. J. was understood to concur.

Rule discharged.

CHARLES PALMER *v.* SPARSHOTT.

(4 Man. & G. 137—141; S. C. 4 Scott, N. R. 743; 11 L. J. C. P. 204.)

By an agreement between A. of the one part, and B. and C. of the other part—reciting that B. and C. had assigned certain property to A. for 150*l.* apiece, and that it had been agreed that A. should retain 50*l.* out of each of the purchase moneys—the defendant, in consideration of the two several sums of 50*l.*, and 50*l.* so retained, promised B. and C. to indemnify “them and their and each of their estates” from the costs of a certain action: Held that C. might sue A. alone upon this promise without joining B.

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ASSUMPSIT. After reciting that John Ewer Poole claimed to be a creditor of, and entitled to receive from, the defendant and the plaintiff, and from divers other persons, the sum of 157*l.* 18*s.* for work done in relation to certain premises at Norwood, wherein the plaintiff, the defendant, and the said other persons were severally and respectively interested, which money, if due at all, was due from the plaintiff, the defendant, and the said other persons jointly; and further, that Poole had brought an action of debt against the now plaintiff for the recovery of the said sum; and further, that it was then agreed by the plaintiff, the defendant, and the said other persons, that they, the plaintiff, the defendant, and the said other persons should bear and pay in shares, any debt, and damages, costs, and expenses that might ultimately be recovered by Poole against the plaintiff; and further, that the plaintiff had duly conveyed and assigned to the defendant the part, share, and interest of him the plaintiff, of and in the said premises at N., at and for the consideration of 150*l.*; and further, that at the time of the completion thereof by the defendant and plaintiff, it was arranged that the defendant should retain 50*l.* of the said purchase and consideration money of 150*l.*, and release the plaintiff from any liability in respect of the said debt &c., and expenses of *the said action; the declaration stated, that thereupon afterwards, in consideration thereof, and that the plaintiff, at the special instance, &c., had permitted and suffered the defendant to retain and keep, and that the defendant had retained and kept, 50*l.* of the said purchase or consideration money of 150*l.*, the defendant undertook, &c. to save harmless, and indemnify, him, the plaintiff of, from, and against all debt &c. to be recovered and received by Poole in respect of the said action, or of any suit or proceeding to be instituted or taken by Poole in respect of the same; and further, that in case a sixth part of the whole amount of the damages, &c., to be in any way incurred in and about the said action, suit, or proceeding as aforesaid, or in relation thereto, should not amount

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to the sum of 50*l.*, then the defendant, his heirs, &c., should pay or hand over to the plaintiff the difference in amount between the said sum of 50*l.* and the amount of such respective sixth part of the said damages, &c., when the same should be ascertained. Averment—that the defendant did retain the sum of 50*l.*; that Poole by the judgment of the Court of Exchequer recovered against the plaintiff 175*l.* 15*s.* (*prout patet*); that Poole sued out a writ of *testatum fi. fa.* indorsed to levy the said sum, &c.; and that the plaintiff was compelled to pay the sum so recovered, with costs, &c., amounting to 190*l.* 5*s.*; of all which the defendant had notice, &c.

Plea: *non assumpsit*.

At the trial before Maule, J., at the sittings for Westminster during this Term, the following document was given in evidence.

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“Memorandum of agreement made, &c., between William Sparshott (the defendant) of the one part and Frederick William Palmer, and Charles Palmer (the plaintiffs), of the other part: Whereas an action at law was lately commenced in Her Majesty’s Court *of Exchequer of Pleas by one Thomas (1) Poole against the said C. P., and upon the trial of the said case a verdict was given for the plaintiff for the sum of 82*l.* 10*s.*: And whereas various proceedings have been taken by and on behalf of the said C. P. to obtain a new trial of the said action, and which proceedings are still pending: And whereas it hath been arranged that any damages, costs, and expenses that may ultimately be recovered by the said T. P. shall be borne and paid in equal shares by the said W. S., F. P. and C. P., and three other parties, who are equally interested with them in certain estates and premises situate at, &c.: And whereas by a certain indenture bearing even date with these presents, and made between the said F. P. of the first part, the said C. P. of the second part, and the said W. S. of the third part, in consideration of the sum of 150*l.* apiece the said F. P. and C. P. duly conveyed and assured their two several undivided sixth parts, shares, and interests of and in the said estates and premises to the said W. S., his heirs, &c.: And whereas at the time of the completion of the said purchase it was arranged that the said W. S. should retain 50*l.* out of each of the said purchase or consideration moneys of 150*l.*, and release the said F. P. and C. P. from any liability in respect of the said damages, costs, and expenses of the said action: Now these presents witness, that for

and in consideration of the said two several sums of 50*l.* and 50*l.* so retained by him as aforesaid, the said W. S. doth hereby, for himself, his heirs (1), executors, &c., covenant (1) and agree with and to the said F. P. and C. P., their executors, &c., to save harmless and indemnify them the said F. P. and C. P., and each of them, their heirs, executors, and administrators, and their and each and every of their *estates and effects of and from and against all damages, costs, and expenses to be in any way incurred in and about the said action, suit, or proceedings as aforesaid or in relation thereto, shall not amount to the sum of 50*l.*; that he the said W. S., his heirs, executors, and administrators, shall and will pay or hand over to the said F. P. and C. P., their executors, &c., the difference in amount between the said sums of 50*l.* and the amount of such respective sixth parts of the said damages, &c., when the same shall be ascertained. As witness, &c."

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It was suggested, on the part of the defendant, that there was a variance between the declaration and the document put in evidence, inasmuch as the former stated the contract of indemnity to have been made with the plaintiff alone, and the latter showed it was made with the plaintiff jointly with Frederick William Palmer. The learned Judge was of that opinion; but he offered to amend the declaration; and the plaintiff recovered a verdict for 186*l.*

Manning, Serjt. now moved in arrest of judgment, or for a new trial, supposing the amendment not to have been actually made, in which case the objection as to the variance would be still open.

(TINDAL, Ch. J.: Leave having been given to amend by the learned Judge, it must be taken as though the amendment had actually been made.)

Then by the amendment the declaration is rendered bad; for it will show the objection on the face of it.

(ERSKINE, J.: The amendment only goes to the consideration, and not to the promise; a consideration from two will uphold a promise to one.)

The declaration, as amended, shows a joint cause of action; and it is not the less joint because it is for the benefit of the two Palmers separately.

(1) The instrument not being under seal, the mention of "heirs" and the insertion of the word "covenant" were of course nugatory,

PALMER TINDAL, Ch. J. :

^{v.}
SPARSHOTT. It appears to me that this case falls within the principle, that where a man covenants with *two or more jointly, yet if the interest and cause of action of the covenantees be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damages ; notwithstanding the words of the covenant are joint ; as established in *Windham's* case (1), and others (2). Here, the agreement was certainly joint in its terms, but the interest of the parties was distinct and separate. Each party had, in effect, advanced the sum of 50*l.* ; each had sustained a separate damage ; and each, therefore, might sue without joining his co-promisees.

COLTMAN, J. :

The language of the agreement is, that the defendant shall “ save harmless and indemnify the said Frederick William Palmer and Charles Palmer, their heirs, executors, and administrators, and their and each of their estates,” which are clearly severable words.

ERSKINE and CRESSWELL, JJ. concurred.

Rule refused.

1842.
April 20.
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CLARIDGE v. MACKENZIE.

(4 Man. & G. 143—158 ; S. C. 4 Scott, N. R. 796 ; 11 L. J. C. P. 72.)

A. pays rent to B., a termor by whom A. was not originally let into possession, A.'s possession having been derived from C., under a demise from E., a prior owner of the term. After the expiration of the term, A., not knowing that the term had expired, enters into a parol agreement with B. for a tenancy, and, under that agreement, pays rent to B. A. is not estopped from showing that B.'s title had expired.

Such an agreement is not equivalent to a fresh letting into possession.

TRESPASS, for breaking and entering the plaintiff's house, situate No. 51, South High Street, Marylebone, with an asportation of goods. There was a second count for similar trespasses on another day.

Plea : not guilty—by statute.

At the trial, before Tindal, Ch. J., at the sittings for Middlesex

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| (1) 5 Co. Rep. 7 a. | <i>Bircham</i> , 27 R. R. 350 (3 B. & C. 254 ; |
| (2) See <i>Wotton v. Cooke</i> , Dyer, 337 b ; | 5 Dowl. & Ry. 106) ; <i>Place v. Delegul</i> . |
| <i>Wilkinson v. Lloyd</i> , 2 Mod. 82 ; <i>Tippet</i> | 44 R. R. 749 (4 Bing. N. C. 426 ; 6 Scott. |
| <i>v. Hawkey</i> , 3 Mod. 263 ; <i>Withers v.</i> | 249). |

after last Michaelmas Term, it appeared that the action was brought for two different distresses taken by the defendant, who claimed to be landlady to the plaintiff. The first distress was taken on the 2nd of July, 1840, for a year's rent up to the preceding Midsummer; and the second in the October following, for a quarter's rent up to Michaelmas. The rent and expenses *were paid by the plaintiff on both of these occasions under protest (1).

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In anticipation of the defendant's case, it was proved on the part of the plaintiff that in 1710 the Duke of Newcastle purchased the freehold of a plot of ground in Marylebone, including the *locus in quo*; the property on his death passed to his daughter and heir, afterwards the Countess of Oxford, and was subsequently vested in trustees for her, with powers to them to grant building leases.

In July, 1740, the trustees granted a building lease to John Payne of a piece of land comprising the *locus in quo*, at a ground rent of 6*l.*, for a term of ninety-nine years, commencing at Lady Day, 1740, old style (6th of April new style), which lease therefore expired on the 6th of April, 1839.

The reversion of the estate had vested in the present Duke of Portland by the marriage of one of his ancestors into the Oxford family.

Payne, having mortgaged the premises to John Hatch, bequeathed his interest in them to Jane Saunders, who, together with Mrs. Ann Hatch, the legal representative of the mortgagee, by a lease dated the 23rd of June, 1762, underlet a portion, comprising the *locus in quo*, to Thomas Pitts, at a ground rent of 4*l.*, for a term of seventy-six years from Midsummer Day in that year. This lease therefore expired on the 24th of June, 1838.

Jane Saunders, after the underlease to Pitts, paid off the mortgage, and obtained a reassignment from Ann Hatch, of the original term.

Payne's interest in the original lease, by various mesne assignments, passed from Jane Saunders to different parties; and there was some evidence to show that it *was vested in one Gledhall at the time of the expiration of such original lease in April, 1839.

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Pitts's interest had vested (though it did not appear in what manner) in Daniel Mackenzie, the father of the defendant; and in 1810 D. Mackenzie let the premises to one Tilbury for a term of twenty-eight years from Midsummer in that year; which

(1) *Seemle*, that no protest was necessary, or could be of any effect.

CLARIDGE lease, consequently, expired at the same time with the lease to
 t. Pitts, viz., on the 24th of June, 1838 (1).
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Tilbury built two houses on the premises so leased to him, and let one of them (the *locus in quo*) to the plaintiff, who paid rent (42*l.* per annum) regularly to Mackenzie during his life (the rent being generally paid to the defendant as his agent), and after his death to the defendant, who claimed as his representative.

After the expiration of the sublease to Pitts (24th of June, 1838), the plaintiff, supposing that the title to the premises was in the defendant, agreed verbally (according to the testimony of a witness of the name of Richards) to continue her tenant at the rent of 35*l.* per annum; but no explanation as to the state of her title was then given; and he paid the rent regularly up to Lady Day, 1839. At Midsummer in that year the defendant demanded a quarter's rent; but the plaintiff, having been made aware of the Duke of Portland's title, refused to pay. The defendant thereupon distrained; the plaintiff replevied, but was nonsuited in the action, which he brought in consequence, by reason of a formal defect of evidence, and the quarter's rent was paid to the defendant. There was some evidence that this payment had been made under protest. No rent was paid to the defendant from that time up to Midsummer, 1840; and it was for that year's rent that the *first distress was made, in respect of which the present action was brought.

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All the evidence as to the title of the Duke of Portland was objected to on the part of the defendant, upon the ground that it was incompetent to the plaintiff, as tenant to the defendant, to dispute her title. The evidence was, however, admitted. The LORD CHIEF JUSTICE left it to the jury to say whether, at the time of the two distresses, the plaintiff was in possession, as tenant to the defendant, under an agreement with her after her term had expired; and, secondly, supposing such an agreement to have been made, whether it was made under error or mistake; and his Lordship directed the jury, that if they should be of opinion that there was no agreement, or that, there being one, it had been made under an error or mistake, they were to find for the plaintiff. The jury returned a general verdict for the plaintiff.

Shee, Serjt., in last Hilary Term (17th January), moved for a

(1) According to several modern underlease, but as an assignment. cases, the demise from D. Mackenzie *Vide 5 Man. & Ry. 157—162.* to Tilbury would operate, not as an

new trial, on the ground that the above evidence had been improperly received, and also that the verdict was against evidence.

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The COURT at first refused the rule; but afterwards (21st of January), the LORD CHIEF JUSTICE intimated that a doubt had occurred to the minds of some of their Lordships as to the right of the plaintiff to dispute the defendant's title; and a rule *nisi* was granted. On a subsequent day (27th of January), on the application of *Talfourd*, Serjt., who moved upon an affidavit that the defendant had put in a fresh distress, the cause was fixed for argument on this day, when

Talfourd, Serjt., showed cause against the rule:

The question is, whether, under all the circumstances of the *case, the plaintiff is at liberty to dispute the title of the defendant to the premises in question. There is no doubt that the plaintiff did, by paying rent to her after her title had in fact expired at Midsummer, 1838, *prima facie* acknowledge her title; but it is obvious that such payment was made under a mistake; for it would be absurd (1) to suppose that the plaintiff, knowing that defendant had no title, would voluntarily pay rent to her. It is important to observe that the plaintiff was not let into possession by the defendant, but by Tilbury, and that he remained in possession when Tilbury's lease expired.

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There are three suppositions upon which the plaintiff was justified in disputing the defendant's title.

First, even supposing that the plaintiff had been let into possession by the defendant, still it would be competent to him to show that her title had since expired. The only payment made subsequently to Lady Day, 1839, when the Duke of Portland's title accrued, was made after the plaintiff had, in consequence of an accident, been nonsuited in replevin, and was made under protest; and assuming, that the defendant had title for the three quarters of a year between Midsummer, 1838, and Lady Day, 1839, there was no acknowledgment of her title after the latter period, and the plaintiff may show that it then expired. In *Burne v. Richardson* (2) it was decided that a termor, who had let to an under-tenant, could not, after his term had expired, enforce the continuance of the undertenancy by distress, if the under-tenant refused to acknowledge him as landlord, or paid him under threat of distress.

(1) *Vide infra*, 511, 513.

(2) 14 R. R. 647 (4 Taunt. 720).

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Secondly, the plaintiff may have made the new bargain with the defendant for the three quarters of a year only, *on the supposition that she had title for that period. Thirdly, either the alleged agreement with her after her title had expired, if made at all, was clearly made under a mistake as to the facts, or the defendant must have falsely asserted a title to the premises; and either way the plaintiff is not estopped from disputing her title. In *Fenner v. Duplock* (1), payment of rent by a lessee to a lessor after the lessor's title had expired, and after the lessee had notice of an adverse claim, was held not to amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless, at the time of payment, the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired. He also relied upon *Gregory v. Doidge* (2).

Shee, Serjt., in support of the rule :

The fact that the defendant has no title is only shown by the evidence, the admissibility of which was objected to. It is argued that the plaintiff was not let into possession by the defendant; but he was clearly in possession at the time when the defendant's title is shown to have expired; and though there was not a letting into corporeal possession, there was distinct proof, that after that period a new contract of tenancy was entered into between the plaintiff and the defendant, for a different term and at a different rent from the former. This amounted to a new letting into possession by the defendant, and not merely to an attornment on the part of the plaintiff. The payment of the rent for three quarters of a year after Midsummer, 1838, is not disputed, and it was again paid after the nonsuit in the replevin, which was after the Duke of Portland's title had accrued. If this nonsuit had been accidental, as it was contended, a new trial *might have been obtained. The relation of landlord and tenant, therefore, had clearly been established between the parties; and consequently the rule of law, that the latter cannot dispute the title of the former, applies. The cases of *Gregory v. Doidge* (3), *Gravenor v. Woodhouse* (4), and *Rogers v. Pitcher* (5) might assist the plaintiff, if the facts were that he was not let into possession by the defendant, and if there had been a

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(1) 27 R. R. 537 (2 Bing. 10; 9 B. Moore, 38).

(2) 3 Bing. 474; 11 B. Moore, 394.
Vide post, 510, n. (4), and 511.

(3) 3 Bing. 474; 11 B. Moore, 394.

(4) 25 R. R. 582 (1 Bing. 38; 7 B. Moore, 289).

(5) Stated 25 R. R. 582, 586 (6 Taunt. 202; 1 Marsh. 541).

mere attornment by mistake. But the facts are the other way; and therefore it was not competent to the plaintiff, even to show that the defendant's title had expired. [He cited *Doe d. Knight v. Smythe* (1) and *Phipps v. Sculthorpe* (2).]

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TINDAL, Ch. J. :

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This is an action of trespass brought for two distresses; the first for a year's rent claimed by the defendant to be due from the plaintiff at Midsummer, 1840; the second for a quarter's rent at Michaelmas in the same year. The question in the case is, whether the plaintiff, who now disputes the legality of these distresses, is at liberty to do so, or whether he is not precluded by a rule of law, that a tenant cannot dispute the title of his landlord. There is no doubt, upon the evidence, that the defendant had, in point of fact, no title whatever to the premises in question after Midsummer, 1838. The Duke of Portland's reversionary estate did not accrue till old Lady Day, 1839; the mediate interest being vested in some one else, but in whom it did not very clearly appear (3), nor is it material.

It appears to me that this case does not fall within the rule adverted to; and that upon two grounds.

First, upon the ground that there was no new taking of the premises by the plaintiff, or any letting into possession by the defendant; and secondly, that even assuming there was such a new taking or letting into possession, it was left by me to the jury to say, whether the transaction took place on the part of the plaintiff without a knowledge of the circumstances, and that the jury found such to be the case.

Upon the first point, I think it was competent for the plaintiff to show that the defendant's title had expired. The plaintiff was in possession of the premises; and after the expiration of the defendant's interest, he continued *to occupy, as tenant by sufferance under the party who was entitled to the intermediate term of three quarters of a year. The witness Richards speaks of a new agreement having been entered into between the plaintiff and the defendant, that the former should continue in possession as tenant to the latter: but there was no new possession given by the defendant;

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(1) 16 B. R. 486 (4 M. & S. 347).

(2) 18 B. R. 426 (1 B. & Ald. 50).

(3) Probably this small reversionary interest was not worth the liability to

which a claimant would have subjected himself in respect of the covenants of the original lease.

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she was in no way prejudiced: she could not have turned the plaintiff out of possession; and before their agreement, if she had brought her ejectment, the plaintiff might have shown that she had no title, and that the title was in some one else. It is not like the case of a person letting another into possession of vacant premises; it is in fact a remaining in possession of premises which had been formerly occupied by the tenant. It is said, indeed, that this makes no difference, and that the facts of this case amounted, in law, to a new letting into possession; and the case of *Balls v. Westwood* (1) was cited as an authority to show that where a party has come in under another, the former cannot show that the title of the latter has expired without solemnly renouncing such title, and commencing a fresh holding under another person. But though such appears to have been Lord ELLENBOROUGH's opinion in that case, his opinion was subsequently altered; for in *Doe d. Lowden v. Watson* (2) that learned Judge held that a defendant in ejectment, who had paid rent to the lessor of the plaintiff, might show that his landlord, pending the term, had sold his interest in the premises; that is, in effect, the tenant was allowed to show an alteration in his landlord's title. So, in *England d. Syburn v. Slade* (3), which was ejectment by a landlord against a tenant whose term had expired, it was held that the latter was not barred from showing that his landlord's title had expired. And in *effect all that the plaintiff proposes to do in this case is, to show that the defendant had at one time a good title, which has since expired.

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But upon the other point, I cannot distinguish this case from that of *Gregory v. Doidge* (4), where the plaintiff in replevin had occupied lands under A., and upon A.'s death had entered into an agreement to pay rent to the defendant, and paid 1s. as an acknowledgment of his title, being ignorant that it was disputed. It turning out afterwards that the defendant had no claim to the property, this Court was clearly of opinion that the plaintiff, having come into possession under a former owner, and having

(1) 2 Camp. 11; and see *Keilwey*, 65. (Over. *Mountney v. Collier* (1853) 1 El. & Bl. 630; 22 L. J. Q. B. 124.)

(2) 2 Stark. N. P. C. 230.

(3) 2 R. R. 498 (4 T. R. 682).

(4) 3 Bing. 474. [In that case, which came before the Court upon a rule *nisi* to enter the verdict for the plaintiff, no formal judgment appears

to have been delivered. The Court made the rule absolute intimating that they "considered the principle to have been clearly established" by *Rogers v. Pitcher*, 6 Taunt. 202 (see 25 R. R. 586), *Williams v. Bartholomew*, 4 R. R. 816 (1 Bos. & P. 326), and *Fenner v. Duplock*, 27 R. R. 537 (2 Bing. 10). —A. C.]

entered into the agreement in ignorance of the defect in the defendant's title, might, under a plea of *non tenuit*, show that the defendant was not his landlord (1). The tenant's right to dispute the title is there put in the most precise way, being raised by the express plea of *non tenuit*; and that case seems to me to embrace the case now before us. Upon the second ground therefore, supposing that there had been a new tenancy created after the expiration of the defendant's title, I think it clear that the plaintiff had a right to show what were the circumstances under which he entered into the agreement with the defendant—a right to show the jury that, at that time, he was ignorant of the real facts as to the defendant's title. Now, it is highly improbable that the defendant disclosed to the plaintiff that she had no right to the premises; for if she had, no man of common sense (2) would have taken her as his landlady; but, in fact, she then asserted, and even now stoutly maintains, her right to the premises. *I left it to the jury to say, whether the agreement in question was entered into by the plaintiff with a full knowledge of the facts, or under a misapprehension as to their nature; and they, in effect, found the latter. I see no reason to be dissatisfied with their verdict; and the case of *Gregory v. Doidge* is an authority to show that the direction to the jury was correct.

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Upon the whole, therefore, I am of opinion that the present rule must be discharged.

COLTMAN, J. :

I am of the same opinion. In the case of *Doe d. Higginbotham v. Barton* (3), where a mortgagor in possession had demised the premises, and the tenants, having received notice from a party to whom their lessor had executed a second mortgage, had paid rent to him, the question was, whether the tenants could, in ejectment by such second mortgagee, dispute his title. Lord DENMAN, Ch. J., in giving the judgment of the Court, said, "It is clear that the lessor of the plaintiff never had any legal estate; and he must rely on the rule with regard to landlord and tenant. That rule is fully established: viz. that the tenant cannot deny that the person by whom he was let into possession had title at that time: but he may

(1) See *Williams v. Bartholomew*, 4 R. R. 816 (1 Bos. & P. 326).

(2) He would have placed himself in the position of being liable to pay the amount of the rent over again to the

Duke of Portland, either in the shape of mesne profits or as a compensation for the use and occupation.

(3) 52 R. R. 354 (11 Ad. & El. 307; 3 P. & D. 194).

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show that such title is determined. With respect to the title of a person to whom the tenant has paid rent, but by whom he was not let into possession, he is not concluded by such payment of rent, if he can show that it was paid under a mistake."

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In this case, therefore, if the plaintiff was not let into possession by the defendant, it is clear that he is not precluded from showing that her title is at an end. What, then, is the meaning of being let into possession? The plaintiff, it is admitted, was not let into corporeal possession by the defendant; he had been let in by *Tilbury, quite independently of Mackenzie (1). But then it is argued that in July, 1838, the plaintiff entered into an agreement to take the premises from the defendant; and I think that such must be considered to be the result of the evidence. And if she had a legal right at that time, and might have turned the plaintiff out of possession, I am not prepared to say but that he must have formally surrendered to the defendant. But the infirmity of the defendant's case consists in this, that at the time of this agreement she had in fact no power to turn the plaintiff out of possession: and I think therefore that he cannot be said to have been let in by her. The question then is, was this agreement made under a mistaken notion as to the facts? This point was properly left to the jury, and they have found in the affirmative. The plaintiff, therefore, was entitled to show that, at the time of making the distresses, the defendant's title had determined.

ERSKINE, J. :

I am of the same opinion. The facts of the case are all perfectly clear, and indeed are not disputed. After Midsummer, 1838, there was no title in the defendant; but the title of the Duke of Portland did not accrue till the 5th of April following. The plaintiff had been let into possession originally, not by the defendant, but by Tilbury; but after his right had expired (which was at Midsummer, 1838, when the defendant's title also expired), the plaintiff had paid rent to the defendant up to Midsummer, 1839, and, as it would seem, not under protest. This was a *prima facie* acknowledgment of her title; but the cases that have been cited show, that where such a payment has been made in ignorance of the real circumstances, and the tenant has not been let into possession by the party claiming to be *landlord, the former may show the want of title of the latter. The defendant, however, relies

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(1) *Vide ante*, 506, n. (1).

upon an agreement proved by the witness Richards to have been made in July, 1838, after the expiration of her term, whereby the plaintiff agreed to hold the premises as her tenant; and if this agreement were made with a full knowledge of the facts, perhaps the plaintiff would not be entitled to deny that he was bound to pay her rent. But it is impossible to suppose that he knew she had no title at the time of the agreement; and the evidence shows that no explanation was at that time entered into. Is the agreement, then, to be taken as conclusive? There were two questions left by my Lord to the jury. The first was, whether the plaintiff was in possession as tenant to the defendant under the agreement; the second, whether the agreement was made with a full knowledge of all the circumstances. The jury found a general verdict for the plaintiff, and must therefore be taken to have found, either that there was no agreement, as stated by the witness Richards, or that the plaintiff had, at the time, no knowledge of the facts. It is probable they thought the agreement was in fact made, but under a mistake as to the facts. It is said this is not merely the case of an attornment, but is a letting into possession; and the rule of law is relied upon, that under such circumstances, the tenant cannot deny the landlord's title. Now I agree that this might be so if in July, 1838, the plaintiff had made the agreement with knowledge of the facts; but it is clear he was in perfect ignorance as to them, or, at any rate, was not fully aware that the defendant had no title to the premises. Then, is there any difference between an express agreement to hold of a party and an attornment to him? They each amount to an admission of such party's right. Unless it could be shown that the defendant had put the plaintiff into actual possession, I think the agreement *would stand on the same footing as an attornment. If, indeed, at that time, the defendant might have turned the plaintiff out of possession, he could have not denied her title. But that is not so; because if, in July, 1838, the defendant had brought her ejectment, she must have stood on her own title, and she had, in fact, none to prove. I am therefore of opinion that an agreement entered into under these circumstances, does not preclude the plaintiff from disputing the defendant's title to the premises.

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CRESSWELL, J.:

I also am of opinion that the direction of the LORD CHIEF JUSTICE was right, and that the finding by the jury was so likewise.

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It is undoubtedly true that if one person obtain possession of premises by means of another as his landlord, the former is estopped in law from saying that the latter had no right to give such possession. If, therefore, he obtain possession as tenant, he must give up the premises to his landlord,—*rebus sic stantibus*. But if he mean to insist that the landlord's title is at an end, he must show a change of circumstances, such as a sale of the property by the landlord, or an expiration of his title by efflux of time, &c. Now, assuming that the plaintiff in this case took possession from the defendant, I should by no means have been sure that the plaintiff might not have shown that the defendant's title was gone. But the question here is, whether the LORD CHIEF JUSTICE was right in leaving the questions, as he did, to the jury. (His Lordship here recapitulated the facts of the case.) Now the arrangement with the defendant recognises her as the party entitled to the remainder, which in point of fact she was not. Then the question arises, was that arrangement entered into under a mistake or not? The evidence clearly shows that, at the time, she was asserting her right to the property; her title therefore was recognised by the *plaintiff under a mistake. It seems to me, therefore, that the case was rightly left to the jury, and that there is no ground for disturbing the verdict.

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Rule discharged.

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May 3, 4, 5.

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(4 Man. & G. 179—208; S. C. 4 Scott, N. R. 844; 11 L. J. C. P. 177.)

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In case, for infringing a patent for a new and improved process or manufacture of silk, the infringement alleged in the declaration was that the defendant had, directly and indirectly, made, used, and put in practice the said invention, and counterfeited the same: Held, that this allegation was supported by proof that the defendant had ordered silk to be manufactured by certain parties by the plaintiffs' process, and had afterwards received and sold the same.

A plea in an action on the case for infringing a patent, set out the specification *in hæc verba*, and alleged that the plaintiffs did not inrol any instrument other than that set out, and that such instrument did not particularly describe the nature of the invention. The jury having found a verdict for the plaintiffs upon their traverse of this plea: Held (*hesitant*—COLTMAN, J.), that judgment could not be arrested upon the ground of the specification being otherwise defective.

The third and fourth issues raised the question whether the alleged invention was a new invention; the jury found specially that it was not a new invention, or a new combination, but that it was an improved process: Held that, upon these issues, the verdict should be entered for the defendant.

CASE, for the infringement of a patent, granted to the plaintiffs for a new and improved process or manufacture of silk, and silk

in combination with certain other fibrous substances. The declaration stated that the patent contained the usual provisoes, as to the invention being new, and as to the enrolment of a specification; and that the plaintiffs were the true and first inventors of the process described, and did enrol a certain instrument in writing containing a proper specification. Breach: that the defendant had directly and indirectly made, used, and put in practice the said invention and every part thereof, and counterfeited, imitated, and resembled the same.

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Pleas: first, not guilty; secondly, a traverse of the allegation that the plaintiffs were the inventors; thirdly, that the invention in the letters patent and in the specification mentioned, was not a new invention; concluding with a verification; fourthly, that the said alleged invention and improvement were of no benefit or advantage to the public; concluding with a verification; fifthly, that the said instrument in writing in the declaration mentioned, was as follows:

“To all to whom, &c. (It then recited the grant of *the letters patent to the plaintiffs, their executors, &c. with the provisoes for inrolling a specification, and then proceeded thus:) Now know ye, that in compliance with the said proviso, I, the said J. Gibson, on behalf of myself, and also of the said J. G. Campbell, do hereby declare that the nature of our said invention consists; first, in a part of our process by which we discharge the gum from that peculiar kind of silk denominated silk-waste, when the same is in the state of sliver or rove; secondly, in a part of our process by which we dye silk-waste, when in the state of sliver or rove; thirdly, in a part of our process by which we spin yarn from dressed or heckled silk-waste of long fibres, either in the gum or discharged; fourthly, in a part of our process by which yarn from silk-waste with long fibres may be spun in combination with flax of a similar length of fibre; fifthly, in a part of our process by which yarn from silk-waste with long fibre is spun in combination with wool; sixthly, in the application of our improved process to the throstle-machine on the principle of the long ratch for the new and useful purpose of spinning silk-waste; seventhly, in certain improvements effected by us in the throstle-machine by which its utility in spinning silk-waste is greatly augmented; eighthly, in the application of water to silk-waste with long fibres in the process of spinning with the long ratch.

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“Having thus explained the nature or leading characteristics of

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our invention, it is desirable before we enter into the practical details of them to give a brief outline of the methods, heretofore adopted, for spinning yarn from silk-waste.

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“Silk-wastes differ considerably with respect to quality and cleanliness, and they are generally in a ravelled state. To free them from naps and other refuse matters, and to clear the ravelings, they are first submitted to the action of a machine called a breaker, for the purpose *of breaking or clearing out the more stubborn or knotty ravelings. The waste is next put under the operation of the dressing-machines to be farther unravelled and cleared from naps and other impurities, which process also straightens the filaments and causes them to lie evenly together, resembling in this respect heckled flax, although the fibres of the latter usually possess more uniformity as to length. This process of dressing is applicable to silk-waste, either in the gum or discharged. The former, however, is more easily dressed, contains less refuse, and is generally of a better quality. The third process upon the ordinary plan is, to take the dressed silk to the cutting-machine, where it is cut into lengths of about two inches, a little more or less, according to circumstances. If the silk-waste that has been thus cut be in the gum, it is next discharged and afterwards dried. The silk having become matted in the discharging process, the fibres of it are next opened up by a scutching-machine, or other similar apparatus before it undergoes the process of carding. When carded, the roving is prepared by a similar engine to that used for cotton, and it is spun on the mule-jenny, which is on a similar principle to that of the cotton-jenny. Having thus explained the old ordinary process of converting silk-waste into yarn, I will proceed to describe our novel process, by which we produce our new or improved manufacture of yarn or thread.

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“The silk-waste having been dressed in the usual way, or in any other manner that may be found more advantageous (such as heckling or otherwise), either discharged or in the gum, we submit it to the drawing, roving, and spinning machinery, thereby entirely obviating the supposed necessity of cutting or shortening the filaments of silk-waste, a destructive process, which has heretofore been considered as an indispensable sacrifice in order to convert it into yarn or thread. The kind of *machinery we have found to answer best for the drawings and rovings of dressed heckled or carded silk-waste of long fibres, is the same as that used by flax-spinners; and we adopt the same methods as are practised by

them with long or cut-line flax. The silk is first submitted to the spreading or first drawing-machine, the slivers obtained from which are doubled and applied to the second drawing, and in like manner to the third drawing-machine, and finally to the roving-machine. The number of doublings and drawings requisite will depend upon the kind of silk used, which every competent manufacturer will know how to determine and arrange.

“ It may be proper to observe, that there are several kinds of flax-drawing and roving-machines, and as they are in common use for flax and tow, no description of them is necessary, and it will therefore be sufficient to distinguish them by their names of circular, spiral and sheet or chain. Cut-line flax and tow, drawing and roving machines are made either on the circular or spiral plans. The sheet or chain is also made for cut-line flax, but not for tow. The drawing and roving-machines that we have found to answer best, are those which are made on the spiral plan, as the gills or heckles of these come closer to the nip of the drawing-roller than in either of the other plans; and thereby enables the short filaments of the silk to be drawn and distributed more uniformly with the long fibres than if the said heckles or gills were more remote from the drawing-roller. For the longest fibres of dressed or heckled silk-waste, we employ what is designated by flax spinners long-line preparation. For the medium lengths of fibres of dressed, heckled or carded silk, cut-line; and for the shorter lengths tow-preparations.

“ We have already noticed, that the roving from silk-waste may be made, either when in the gum or discharged, *and that the said rovings may be spun to suit the particular kind of goods to which yarn or thread is to be applied; but as there is a much greater demand for silk yarn discharged than in the gum, we usually discharge the gum from the sliver obtained by the first drawing or spreading-machine. For this purpose the sliver is put into hanks of about half a pound each, then each of these hanks is put into a little bag made of an open fabric, such as thin canvas; a quantity of these are collected (according to the dimensions of the boiler), put into the vessel, and discharged or ‘boiled off’ in the usual manner. After this, the hanks, still contained in the bags, are to be well washed, to free them from the deposition of the glutinous matter, or the presence of soap, alkali, or other impurities. The silk is now to be taken out of the bags with care, and, after being thoroughly dried, the hanks are to be put upon swifts, and after

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finding the end of the sliver, it is to be coiled into cans, or may be wound on bobbins, or otherwise disposed of, as may be convenient. The next operation upon these slivers consists in submitting them to the drawing-machines, whereby the required number of drawings and doublings are to be given, and finally the roving is formed as already mentioned. The process of boiling or discharging gum-silk, we sometimes apply after it has been formed into roving. In this case the roving is to be reeled from the bobbins into hanks of about half a pound weight each; these are to be put into bags, and the discharging conducted by the same process as that described with respect to the sliver. The discharged roving is next to be wound on bobbins preparatory to spinning; but we give the preference to the roving made from silk which has been discharged in the sliver.

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“Another improvement in our process or manufacture consists in dyeing the silk before it is spun into yarn or thread; and we find that this operation is best *performed after it has been discharged and washed, and in the form of the sliver as already described. After dyeing, the silk undergoes repeated doublings and drawings, and is finally made into roving, in the same manner, and by the same mechanism as are employed with the undyed silk. The process of dyeing is also applied by us to silk which has been discharged, previously to its being dressed or heckled; and we usually dye it in the hanks obtained from the sliver of the first drawing. The process of dyeing may also be applied to the rove, which is to be reeled from the bobbins into hanks, of a size and weight the most convenient to the dyer. After dyeing, it is to be wound upon bobbins previously to being spun; but we prefer the roving which has been made from silk dyed in the sliver. Care must be taken that the silk, whether dyed or undyed, be properly dried prior to its being submitted to any of the processes of drawing, roving, and spinning. The advantages obtained in this part of our invention, of dyeing the silk previously to its being spun into yarn or thread, consist in the certainty that the colouring matter will reach every fibre, and consequently produce a more uniform and perfect dyeing. We also find that a superior lustre is obtained by our mode over that wherein the silk is dyed subsequently to being spun; which effect we consider to be caused by the violent action upon the silk by the dyer's process, by which many of the fibres are broken and started from their parallel positions with respect to each other, thereby destroying the wiry and lustrous appearance of the yarn or thread.

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“For making rove from silk-waste of long fibres and flax combined, and from silk-waste of long fibres and wool combined, we employ the same machinery throughout as we do for making rove from silk-waste alone. The proportions of silk-waste to that of flax, and of silk-waste to that of wool, are varied according to the particular *manufacture to which the yarns are to be applied. The method we have adopted is, to obtain slivers of flax, or of wool, from the spreading or first drawing-machine. The number of slivers of flax or of wool to that of silk slivers obtained from the first drawings, is regulated in the second drawings, in proportions suitable for the peculiar description of yarn required.

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“Having now explained the nature of the drawing and roving machinery which we have found to answer best, and the several processes of drawing and roving silk-waste alone, and of silk-waste in combination with wool and with flax, I will proceed to describe the spinning-machine, by which the rove is drawn or elongated into strands, to be spun into yarn or thread. The annexed drawings, for the most part, represent the well-known spinning frame called a throstle, on the principle of the long ratch, as employed in the spinning of flax, which machine, combined with the improvements we have applied to it, we apply to the new and useful purpose of spinning silk-waste of long fibres into yarn or thread, from rove, either in the gum, or discharged or dyed as before-mentioned, and also from rove made from silk-waste of long fibres, in combination with flax or with wool.”

(The document then contained explanations of the machine, with references to letters and figures which would not be intelligible without a drawing, and which are not material for the understanding of the case.)

“Our application of the brass bosses to the drawing roller, together with the application of water, we have found to be an important improvement in the spinning of silk-waste, whether dyed or undyed, as the brass preserves the silk from stains which occur when iron is used. Neither the brass bosses nor the pressing rollers are fluted, which fluting we have found to be unnecessary in spinning silk-waste of long fibres with the ratch *corresponding in lengths thereto. Great advantages also result from employing the throstle-frame, instead of the mule-jenny, for spinning silk-waste. In the first place a great saving is made in the cost of production, by obviating the necessity of operatives at high wages. In the second place, by using a long ratch corresponding to the length of

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fibres to be spun, not only yarn or thread is obtained of very superior strength, but it can be spun to very fine numbers, even as high as No. 200, or upwards, on the cotton scale, a result quite unprecedented in spinning by the throstle. The application of water to the silk, communicated by means of the pressing-roller, not only toughens the fibres, but gives them a greater tenacity or adhesiveness to each other, enabling them to sustain the action of being spun, besides communicating a greater degree of flexibility, which facilitates or induces the ends of the fibres to adhere or incorporate more readily with the yarn. Likewise, owing to the short distance between the top of the spindle and the nip of the bosses of the drawing or delivering roller, the yarn is subjected to less vibration, and can be spun to finer numbers, than with the spindles at a greater distance. The silk yarn thus produced has a smooth wiry appearance, and when spun with but little twist, the natural lustre of the silk fibres is preserved, and it approximates in appearance to tram or organzine silk.

“The spinning frame just described is also applicable to the spinning of silk and flax, combined as well as to the spinning of a combination of silk and wool, in each case varying the sliding ratch to suit the lengths of the fibres to be spun.

[*187] “Having now given the necessary details of the manner in which our invention is to be performed, we desire it to be understood that we disclaim those parts of the process or mechanism, which were, or may have been, *previously to the granting of our patent, well known or in use for the same purposes; but we restrict our claims to the eight several heads of invention mentioned in the early part of this specification, all of which we believe to be new, and of great public utility. In witness whereof,” &c. The plea then proceeded to state, that the plaintiffs did not, nor did either of them, within six calendar months, &c., inrol, &c., any instrument, &c., other than and except the instrument in that plea mentioned and set forth; and that that instrument did not particularly describe and ascertain the nature of the said supposed invention, and in what manner the same was to be performed. Verification.

The replication joined issue on the first and second pleas; and traversed the third and fourth, upon which issue was joined: and to the fifth plea alleged that the plaintiffs did, within six calendar months, &c., inrol, &c., an instrument in writing under the hand and seal of John Gibson, one of the plaintiffs, particularly describing and ascertaining the nature of the said invention, and in what

manner the same is to be performed (to wit) the said instrument in the said fifth plea above mentioned and set forth; and that that instrument does particularly describe and ascertain the nature of the said invention, and in what manner the same was and is to be performed; concluding to the country; upon which issue was joined.

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At the trial before Tindal, Ch. J., at the sittings for Middlesex after Trinity Term, 1841, the specification set out in the fifth plea was read. It was proved on the part of the plaintiffs, that the defendant had ordered silk waste to be spun by certain parties in England, by a process similar to that described by the plaintiff, and had received and sold the silk so spun. Evidence was also given to show, that the ordinary method of spinning silk-waste, previously to the plaintiffs' *patent, was that stated in the specification; namely, by the use of machinery similar to that used in cotton-spinning; and it was proved, that the silk produced by the plaintiffs' process was very superior in beauty and value. On the part of the defendant, evidence was given to show that long before the plaintiffs' patent, silk-waste in the long uncut fibre had been spun by the common machine for spinning flax, and sold in large quantities; that any workman might vary the distance of the spindle from the roller, as described in the specification, at pleasure, and that this had often been done; and that the brass bosses and water trough had long been in general use in the same manner as described in the specification. Notice of objections had been delivered under the 5 & 6 Will. IV. c. 83, s. 5, but nothing turned upon the objections. An application was made for a nonsuit, on the ground that there was no evidence, that the defendant had made, used, or put in practice the invention, or had counterfeited, imitated, or resembled it. The LORD CHIEF JUSTICE refused to nonsuit, but reserved leave to the defendant to move to enter a nonsuit; and the jury returned a verdict for the plaintiff upon all the issues except the second and third, and as to these, they found that the invention was not new, but was an improved process, and not a new combination.

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Channell, Serjt., in last Michaelmas Term, obtained a rule *nisi* to enter the verdict on the second and third issues for the defendant; or to set the verdict aside and enter a nonsuit; or to arrest the judgment; and

Bompas, Serjt., on the next day, obtained a cross rule to enter

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judgment for the plaintiffs on the special finding; or, in the event of the Court being of opinion that the verdict was incongruous, for a new trial.

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Bompas, Serjt. now showed cause against the rule obtained on behalf of the defendant :

First, as to entering a nonsuit. This applies to the first issue. The evidence clearly showed an infringement of the patent by the defendant, supposing the patent to be valid. It appeared that parties had been employed by the defendant to make silk by the plaintiffs' process, and that the silk so made had been sold by the defendant; this was, in effect, a making by him.

(TINDAL, Ch. J. : Upon the principle *qui facit per alium, facit per se* (1).)

Secondly, as to arresting the judgment. This is applied for on the ground that the specification, as set out in the fifth plea, is not sufficient. Two objections, it is understood, are raised to the specification; first, that the processes, by which the improvement is carried into effect, are not described; and, secondly, that no distinction is made between the old and new parts of the invention. As to the first point, it is submitted that the description of the process is sufficiently intelligible. No doubt, any one might use the machine in question for the purpose of spinning flax, notwithstanding the plaintiffs' patent, but it is new, as applied to the spinning of waste silk; and the jury have found that it is an improved process for that purpose; it is therefore the subject of a patent. Even the omission of part of a former process, if it give rise to an improvement, may be a good ground for a patent; as in *Russell v. Cowley* (2), where the plaintiff had obtained a patent for manufacturing metal tubes, by drawing them through pierced dies or holes; and it appeared that a former patent had been obtained for a similar method of manufacturing *tubes by drawing them through rollers, with the additional use of a maundril or stamp. The maundril was not used in the plaintiff's process, and the patent was held valid, as being a great improvement on the former process. As to the second objection; it is sufficient to support a patent for an improvement, if, from reading the specification.

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(1) As to the application of this Abr. 75.
 maxim, see 20 Vin. Abr. 466; 21 Vin. (2) 40 R. R. 758 (1 Cr. M. & R. 864).

an ordinary workman can distinguish the old parts from the new; as in *Harmer v. Playne* (1). * * *

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Thirdly, as to entering the verdict on the second and third issues. It is to be observed, that the present patent is not for any article of manufacture, but for a process. The distinction is pointed out in *Rex v. Wheeler* (2). The process here consists of eight several heads or parts, all of which form but one whole; and the patent is taken out, not for any of the separate parts, but for the whole. It appears from the evidence that, *before the plaintiffs' patent, the spinning of silk-waste was performed by the machinery used for cotton-spinning. The plaintiffs have applied the machinery for flax-spinning to the spinning of silk-waste, and the jury have found it to be an improved process; and, consequently, a great improvement upon the old method of spinning silk-waste. It is said that some parts of the process have been used before for the same purpose; but that will not vitiate the patent if there be novelty in the whole. And, indeed, it may be very doubtful upon the evidence, whether there was any publicity in the previous use of those parts of the process. It is probable that the jury took an incorrect view of the meaning of the words "new invention;" and that as the thing manufactured was not new, and the machine for the purpose was not new, they fancied there was nothing to countenance a claim of a new invention. But that is not so. It was a new or an improved process; and that is a new invention. Or if it be only an improvement, as the jury have in fact found it to be, it is an invention so far as the improvements go, and the subject of a patent. Taking the whole together, it is new as regards the manufacture of silk-waste; it is a new mode of spinning it, and it is for that the patent is taken out.

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(CRESSWELL, J.: It appears that the plaintiffs do not claim the machine, or any part of it, as theirs. It is just as if the old machine for flax-spinning were used in their process.)

Channell, Serjt., in support of the rule obtained on behalf of the defendant:

First, as to entering the verdict upon the second and the third issues. The declaration alleges that this was a new invention; this allegation is traversed by the second plea; and the jury have found

(1) 11 East, 101; *S. C.* in Chanc. 14 (2) 20 B. R. 465 (2 B. & Ald. 345).
Ves. 130.

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that it was not a new invention, or a new combination, but an improved process. Upon this issue, therefore, the *defendant is clearly entitled to the verdict. What is found for the plaintiffs does not give them a right to the patent; and what is found for the defendant wholly destroys it. It is possible that an improved process may be a new invention; but it cannot be so considered in this case, as the jury have expressly found, that, though the plaintiffs' was an improved process, it was not a new invention.

The plaintiffs' patent is taken out for the invention of a new process &c., consisting of improvements; but in fact whatever novelty there is in the process consists merely in the application of a known process for the purpose of spinning silk; and that will not support the patent. [He cited *Hill v. Thompson* (1), *Brunton v. Hawkes* (2), and *Kay v. Marshall* (3).] From *these cases it is clear,

(1) 17 R. R. 156 (3 Mer. 622, 629);
S. C. in C. P., 20 R. R. 488 (8 Taunt.
375; 3 B. Moore, 424).

(2) 23 R. R. 382 (4 B. & Ald. 541).

(3) 50 R. R. 759 (5 Bing. N. C.
492; 7 Scott, 548).

In that case the plaintiff filed a bill in Chancery for an injunction in H. T. 1835; but he did not apply for the injunction pursuant to the prayer of the bill. The defendants, after the usual time for demurring had elapsed, made a special application for leave to demur, which was refused by SHADWELL, V.-C., but granted, upon appeal, by Lord LYNCHURST, L. C. The demurrer was filed, and came on to be argued before the Vice-Chancellor on the 2nd of June, 1835; and on the 9th his Honour ordered the demurrer to stand over for twelve months, and that in the meantime the plaintiff should be at liberty to bring an action. Upon an appeal to Lord COTTENHAM, L. C. (1st of February, 1836), this order was discharged, and the demurrer was overruled (see 1 Myl. & Cr. 373). The defendants then applied to Lord LANGDALE, M. R. for leave to file a double plea to the plaintiff's bill, which was granted (see 1 Keene, 190), and the pleas were filed accordingly; first, denying that the plaintiff had invented any new and improved machinery; secondly, that

the alleged invention was not of any public benefit and utility. Upon the case coming on to be argued before the Master of the Rolls on the 19th of March, 1836, the plaintiff proposed to waive all objections in point of form, on condition that the defendants would consent to proceed at once to a trial at law of the pleas, without first going into evidence in equity; and this having been agreed to by the defendants, a replication was filed, and a decree made, by the MASTER OF THE ROLLS on the 2nd of June, 1836, directing a trial at law upon issues in the terms of the two pleas; and liberty was given to the Judge who should try the cause, to indorse special matters on the *postea*. The issues were tried at the Yorkshire Summer Assizes for 1836, before PARKE, B., when his Lordship expressed an opinion that it was not the intention of the MASTER OF THE ROLLS in directing the issues, that the question of the legal validity of the plaintiff's patent should be inquired into upon the trial, but only that the facts of the case should be ascertained, leaving the question of law to be afterwards disposed of by the Court; whereupon the jury, under his Lordship's direction, found a verdict for the plaintiff on both the issues, and the special facts were indorsed on the *postea* (see 50 R. R. 761 (5 Bing.

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therefore, that if a patent is taken out for an invention consisting of several parts, any one of which is not new, the whole is void. The jury have negatived what is claimed by the plaintiffs, namely, invention; and the finding that the plaintiffs have introduced an improved process, can only mean that old machinery, and previously known principles, have been more skilfully applied by them: but this will not support the patent. The patent consists of eight heads or parts; the fourth and fifth it is not material to consider; the *seventh and eighth may also be omitted; for they relate to the question whether there has been any combination; which the jury have negatived; the sixth, the plaintiffs say, consists, "in the application of their improved process to the throstle-machine, on the principle of the long ratch for the new and useful purpose of spinning silk-waste." This must mean the process as described in the first three heads; the first of these relates to the discharge of the gum from the silk-waste; the second, to dyeing the silk-waste. It is necessary, therefore, to refer to that part of the specification where the processes of discharging and dyeing are described; and it appears that no new mode of performing either operation is claimed; the only difference being as to the time when the operation is to be performed. These, therefore, are

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N. C. 495)). The defendants applied to the Master of the Rolls for a new trial or a special case, on the ground that the learned Baron had taken an erroneous view of the nature of the inquiry intended to be submitted to him by the MASTER OF THE ROLLS, and that the trial ought to have proceeded in the same manner as if an action had been brought at law upon the patent, and the same pleas pleaded in defence to such action, whereby the whole question of the validity of the patent in point of law in respect of the two grounds taken by the pleas would have been tried and disposed of. The motion came on for hearing on the 28th, and again on the 31st, of January, 1837, when, at the suggestion of the MASTER OF THE ROLLS, and with the acquiescence of both parties, an order was made that a case

should be stated for the opinion of this Court. After some further discussion the case was agreed upon between the parties, argued in this Court, and a certificate returned, that the patent was not valid in law (see 5 Bing N. C. 492; 5 Scott, 501). The cause came on to be heard again for further directions before Lord LANGDALE, M. R., on the 27th and 28th of May, and the 3rd of June, 1839, when the question as to the validity of the patent was again argued, and on the 16th of July his Lordship ordered that the plaintiff's bill should be dismissed with costs (see 1 Beav. 535). The plaintiff appealed to the House of Lords against the two orders of the 31st of Jan., 1837, and the 16th of July, 1839 (1); which appeal was dismissed on the 18th of June, 1841.

(1) The above statement of the principal facts and proceedings is compiled from the printed cases of the

appellant and the respondents in the House of Lords.

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no subject for a patent; and all the eight heads being essential to its validity, and expressly made so by the concluding paragraph of the specification, the destruction of any of them destroys the whole patent.

As to entering a nonsuit, the declaration does not charge, nor was any proof given, that the defendant sold any article for which the plaintiffs had a patent. If the silk, then, is to be considered as made by the defendants (and that point, after what has fallen from the Court, is not insisted upon), still the sale of it does not support the charge in the declaration.

(CRESSWELL, J.: How could the plaintiffs charge a vending? They do not claim any articles of sale; but a mere process; and that may raise another question, whether there can be a patent for any thing that is not vendible.)

As to arresting the judgment, if the specification, as set out by the defendant in his plea, does not disclose the subject-matter of a patent, the action must fail. The construction of the specification is for the Court. * * *

[196] TINDAL, Ch. J. :

This is a rule obtained by the defendant calling upon the plaintiffs to show cause why the verdict found on the second and third issues should not be entered for the defendant, or why the verdict should not be set aside and a nonsuit be entered, or why there should not be an arrest of judgment.

I will endeavour to answer the two latter points first, which do not involve the main question in the cause.

As to the first of these, a sufficient answer has, in fact, been already given in the course of the argument. The breach alleged in the declaration is, that the defendant had "directly and indirectly made, used, and put in practice the said invention, and every part thereof, and counterfeited, imitated, and resembled the same."

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*The proof in support of this breach was, that an order had been given by the defendant, in England, for the making of silk by the same process as the plaintiffs'; which order had been executed in England; and that is enough to satisfy the allegation in the declaration,—that the defendant made, used, and put in practice the plaintiffs' invention,—though the silk was, in fact, made by the agency of others.

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With respect to the last objection, which is taken on arrest of the judgment upon the issue raised by the fifth plea, I think no sufficient ground has been established for that purpose. The plea contains the following allegation as to the specification; that it "did not particularly describe and ascertain the nature of the supposed invention, and in what manner the same were to be performed." The jury have, in effect, found that the specification was sufficient, so that a workman of ordinary skill might understand the process and pursue the plan pointed out, so as to produce the proper result. This plea goes to the whole declaration, and the issue has been found against the defendant. No authority has been cited to show that, where a plea has been found to be false in fact, and the verdict has been against the defendant on that part of the plea which is put in issue, he can avail himself of another part, which is not in issue, in order to arrest the judgment. If the defendant had intended to avail himself of the insufficiency of the specification, he might have stated that the patent was void in law, and the question might have been raised on the record, and determined on demurrer. But, after having put in a plea which contains a confession of the whole right of action—which plea is found to be false in fact on the point in issue,—the defendant now seeks to use the other portion of the plea, which is not put in issue, not merely as an admission, on the part of the plaintiffs, for the purposes of the plea, but as an answer to the right of the plaintiffs to recover. The plea contains two allegations; first, that the plaintiffs did not enrol any other instrument than the one previously set out in the plea; and, secondly, that such instrument is not sufficiently particular. The issue is taken on the latter of these allegations; and this admits only that no other specification than the one stated had been enrolled; but the defendant has no right to say that the specification is not only defective as to its particularity, but is also bad for other reasons. I think, therefore, that he is not in a situation to call upon us to arrest the judgment.

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We come then to the main question in the case, namely, whether the defendant has a right to have the verdict entered for him on the second and third issues. These issues are, first, whether the plaintiffs were the true and first inventors of the process described; secondly, whether the alleged invention was a new invention; and the special finding of the jury upon them is, that the invention was not new, but an improved process, and not a new combination. Now, according to the plain meaning of these words, the jury

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appear to have found that there was no novelty in the plaintiffs' alleged invention; that it contained no new combination, but that it was only an improvement in an old process; and the question is, whether, if this finding is supported by the evidence, the issue is found for the plaintiffs or the defendant; and it appears to me that it is found for the defendant, and that the verdict ought to be so entered accordingly.

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In order to ascertain this point, let us see what it is the patent is taken out for, and what the specification declares to be the nature of the discovery. The invention is said to be "a new or improved process or manufacture of silk, and silk in combination with certain other fibrous substances;" and the nature of the invention *is said to consist in eight different branches or parts of the process of spinning the silk. It appears, therefore, that the patent is taken out strictly and entirely for a process.

It is not necessary, on this occasion, to go into the question, whether or not a patent can be supported for a process only. If the specification were properly prepared, it probably might be considered a fit subject for a patent. Lord Chief Justice EYRE seems to be of that opinion in *Boulton v. Bull* (1), where his Lordship, in giving judgment, says, "When the effect produced is some new substance or composition of things, it should seem that the privilege of the sole working or making ought to be for such new substance or composition, without regard to the mechanism or process by which it has been produced, which though perhaps also new, will be only useful as producing the new substance" (2). And he adds, "When the effect produced is no substance or composition of things, the patent can only be for the mechanism, if new mechanism is used, or for the process, if it be a new method of operating, with or without old mechanism, by which the effect is produced" (2). And there are other passages in the judgment to the same effect. Such also seems to have been the opinion of the Court, pronounced by ABBOTT, Ch. J. in *Rex v. Wheeler* (3), where this language, carefully guarding against an abuse of the doctrine, is used; "the word 'manufactures' has been generally understood to denote either a thing made, which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many others, or to mean an engine or instrument, or some part of an engine or instrument to be employed, either in the making of some previously known article,

(1) 3 R. R. 439 (2 H. Bl. 463).

(3) 20 R. R. 465 (2 B. & Ald. 345).

(2) 3 R. R. 466 (2 H. Bl. 493).

or in some other useful purpose, as a *stocking frame, or a steam-engine for raising water from mines. Or it may perhaps extend also to a new process to be carried on by known implements, or elements acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind. But no merely philosophical or abstract principle can answer to the word manufactures. Something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill, is requisite to satisfy this word." And in a subsequent part of the same judgment it is said, "Supposing a new process to be the lawful subject of a patent, he may represent himself to be the inventor of a new process, in which case it would seem that the word 'method' may be properly used as synonymous with process. The language of the patent may be explained and reduced to certainty by the specification; but the patent must not represent the party to be the inventor of one thing, and the specification show him to be the inventor of another; because perhaps if he had represented himself as the inventor of that other, it might have been well known that the thing was of no use, or was in common use, and he might not have obtained a grant as the inventor of it." Now looking at the specification in this case, it appears to me that the patent cannot be supported in law; because the plaintiffs have claimed more than they are in fact entitled to. One cannot read the description of the invention, and the purposes for which it is intended, without understanding it to be a claim of an improvement of certain machinery to produce a certain desired effect. The specification contains eight different parts or heads. (His Lordship read them (1) over.) Now, dismissing *all of the eight from our consideration, but Nos. 6 and 7, I confess I cannot understand those two, except as claiming an improvement of, or a new combination in the throstle-machine. That the patentees meant to claim all the eight parts as forming one whole, is abundantly clear from the latter part of the specification, where they expressly say, "we disclaim those parts of the process or mechanism which were, or may have been, previously to the granting of our patent, well known or in use for the same purposes; but we restrict our claims to the eight several heads of invention mentioned in the early part of this specification, all of which we

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(1) *Supra*, 513—520.

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believe to be new and of great public utility." Therefore the patentees are bound to show that each of the eight parts is new and of public utility. They describe the old method of spinning silk-waste, and then say; "Having thus explained the old or ordinary process of converting silk-waste into yarn, we will proceed to describe our novel process, by which we produce a new or improved manufacture of yarn or thread." The claim therefore is clearly in respect of a novelty; and it must be a novelty, either in the process or in the machinery. Now the jury have found that the subject of the patent is not a new invention, or a new combination; but that it is an improved process; and if the specification had stopped at this point, it might perhaps have been a hard measure to deal to the party, to say this was a claim of new machinery, though I am inclined to think it would be so considered. But they then go on, and, after describing the improvements in the method of obviating the supposed necessity of cutting or shortening the filaments of silk-waste, in discharging the gum and dyeing the silk, they say, "Having now explained the nature of the drawing and roving machinery which we have found to answer best, and the several processes of drawing and roving silk-waste alone, and of silk-waste in combination with wool and with *flax, we will proceed to describe the spinning-machine by which the rove is drawn or elongated into strands to be spun into yarn or thread. The annexed drawings, for the most part, represent the well known spinning-frame called a throstle on the principle of the long-ratch as employed in the spinning of flax, which machine, combined with the improvements we have applied to it, we apply to the new and useful purpose of spinning silk-waste of long fibres into yarn or thread from rove, either in the gum or discharged or dyed, as before mentioned; and also of rove made from silk-waste of long fibres in combination with flax or with wool." They profess therefore to describe the machine to be used for this purpose by drawings: and the expression that these drawings "for the most part represent the well known spinning frame called a throstle," implies that some new part in the machine represented has been discovered by them. They then go on to explain the meaning of the drawings, and the use of the brass bosses, the throstle-frame, and the application of water. (His Lordship here read that portion (1) of the specification.

I confess I feel it impossible to apply all this language otherwise than to a substantive claim to an invention of a new machine, or

(1) *Supra*, 519.

a new combination of the parts of an old machine: the jury, however, have by their special finding negatived both; and, unless we could see from the evidence that they were decidedly wrong, the matter must rest there. I think, upon the finding of the jury, there is sufficient to entitle the defendant to have the verdict entered for him on both the second and the third issues; and, upon the evidence, I see no reason to be dissatisfied with that finding.

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COLTMAN, J.:

I also think that the verdict must be entered for the defendant on the second and third pleas.

The verdict specially found by the jury is clearly not in favour of the plaintiffs; as it, in terms, negatives the allegation in the declaration that the alleged invention was a new invention. And I think that unless each of the eight points in the specification is new, the plaintiffs are not entitled to have the verdict entered for them.

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It is not necessary to consider what the verdict should have been, but what, in fact, it is. The jury have found that the invention was not new; that there was no new combination; but that there was an improved process. Now I am not prepared to say that an improved process may not be considered a manufacture within the meaning of the statute (21 Jac. I. c. 8); and if the jury had only found that the patentees had discovered an improved process, I should have been under some difficulty as to the effect of their finding; but they have negatived both novelty in invention and in combination.

Then, looking at the verdict as being in favour of the defendant on the third plea, we may still examine the evidence to see whether there was such proof of novelty as would, in fact, amount to a new invention; as that might have been a ground for a new trial. But looking at the evidence, I cannot find any novelty in the process so as to satisfy my mind that the jury ought to have found that there was a new process. It seems, in fact, to have been the application of an old machine to a new process, without any material variation in the combination, or any new combination of the parts of the old machine.

It appears from the specification itself that the processes of dyeing and of discharging the gum were performed, in a different stage, it is true, but altogether in the same mode that was formerly known—the only alteration being in point of time.

Looking then at the evidence and the finding of the jury, I think

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they meant that a better article was produced *by the patentees ; but that there was no novelty of combination and no invention employed in bringing about this result.

This, then, disposes of the third issue. As to the point arising on the first issue, it has already been disposed of during the argument.

With regard to the point urged in arrest of judgment, I have not fully made up my mind upon the subject ; but after the decision upon the two other points, it does not seem material to consider it.

ERSKINE, J. :

The jury in this case have found on the first, second, fourth, and fifth issues for the plaintiffs. On the second and third issues there has been a special finding, on an understanding between the parties that the Court should decide for whom the verdict should be entered.

As to the first issue, on which there was an application for a nonsuit, the point was given up by counsel, in consequence of an intimation by my Lord in the course of the argument.

The second and third issues raise the question, whether the process for which the patent was taken out was a new invention. The jury have, in distinct terms, negatived both these issues in the first branch of their special finding ; but they have added something upon which the plaintiffs rely, as being, in substance, in their favour. It is contended, on their part, that the meaning of the special finding is, that the patentees had invented a new process, which, in point of law, would amount to a new invention ; and that, looking at the whole of the evidence, and comparing it with the special finding of the jury, it is, in substance, found that there was a new and improved process, and, consequently, that the plaintiffs were entitled to the verdict on these issues. But it appears that the plaintiffs have not made out *such a case of an improved process as would entitle them, as inventors, to sustain their patent. I think there was no evidence to warrant a different finding from that at which the jury have arrived ; and even though there may be a new patent for a new process as being a new invention, or rather a “ new manufacture ” within the terms of the statute, yet I think upon the evidence, there was clearly no such novelty here.

The alleged invention is divided into eight heads ; the fourth and fifth of which it is not necessary to consider. The patent is claimed in respect of all these eight points ; they are all branches

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of one process ; the plaintiffs must therefore show that the whole process was new in all these parts. Now, undoubtedly, an argument may be raised that there was, at least, some degree of novelty as to the change of the process in which the discharge of the gum, or the dyeing, was effected, as mentioned in the first two heads ; but if the substantial parts of the process were not new, then, I think, the plaintiffs must fail.

The third head is said to consist “in a part of our process by which we spin yarn from dressed or heckled silk-waste of long fibres, either in the grain or discharged ;” and this clearly does not include either of the first two heads. But what novelty of process is there under this third head ? It appears that the process of spinning silk-waste with an uncut fibre, had been before practised. It is said, indeed, that this was done in secret, and that it had not been made public ; and undoubtedly if that fact were made out, I should agree with the plaintiffs that this would be no objection to the patent ; inasmuch as there must be publicity of a previous invention in order to avoid a patent subsequently taken out for the same thing. But I think there was abundant evidence to show that to some extent—and, indeed, to a considerable extent—this *process had been publicly practised before the patent was taken out, although it had not been carried to such a state of perfection as it was under the plaintiffs’ patent.

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I come therefore to the conclusion, on this point, that there was nothing new in the process, or in the machinery, by which the silk-waste was spun ; and the whole of the plaintiffs’ claim amounts to this, that they have applied the old machine and process more skilfully than others have done before them. The result of such application may be useful to the public ; and, indeed, the jury have found that it is so ; but that is not what the plaintiffs have claimed. They have claimed the particular use of a machine, which had been, in fact, used in a similar manner before.

As to the other heads of the specification, they are not proved, on the evidence, to be new ; on the contrary, they are shown to have been previously known and practised by others.

Upon the whole, therefore, I am of opinion that the verdict should be entered for the defendant on the second and third issues.

CRESSWELL, J. :

I also am of opinion that the verdict should be entered for the defendant, on the second and third issues.

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The patent right claimed in this case is undoubtedly of rather a singular character. It is not a claim in respect of any article produced—it is not a claim for any machine for the production of an article—it is not a claim for any particular ingredient—but it is a claim for a mere process.

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There are *dicta*, but there is no distinct decision to be found in the books, that the omission of part of a previously known process may be the subject of a patent; that is a point to which I shall be prepared to *give my consideration when it arises, but it is not the present case.

I do not consider it necessary to go into the evidence in this case; no fault is found with the verdict; but each party claims to have the verdict entered for them upon the special finding of the jury. Now they have found that the subject of the patent is not a new invention, and that it is not a new combination, but that it is an improved process. Then the question is, have the plaintiffs claimed a new invention, or a new combination? For if they have, the jury have found that there was neither. The specification states that the subject of the patent is an “invention of a new and improved process or manufacture of silk, and silk in combination with certain other fibrous substances;” and the patentees then declare that the nature of their said invention consists in eight parts or heads, which are then set forth. And if there could be any doubt as to the intention of the patentees to claim all the eight parts, such doubt would be removed by the concluding passage of the specification, where they say “we restrict our claims to the eight several heads of invention mentioned in the early part of this specification, all of which we believe to be new, and of great public utility.”

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Then does it appear that the patentees claim any novelty of mechanism? I think it clear that they do. I have considerable doubt, whether under the sixth head mentioned in the specification, they mean to claim the throstle-machine on the principle of the long ratch as an invention, or merely the improved use of it: and if there were any question on the ambiguity of the specification, I should be disposed to think this difficult for the plaintiffs to get over. Under the seventh head the plaintiffs clearly claim certain improvements in the throstle-machine, as their own; but the jury have said there was no new invention; and this is equally fatal to *the plaintiffs, whether they claim a part only of the machine or the whole of it, as a new invention. If they mean to claim a new combination, the jury have found there was none.

But I think it clear that the plaintiffs intended to claim a novelty of mechanism. It is immaterial therefore to inquire what may be meant by the term "improved process;" for, whatever it may mean, it does not relieve the plaintiffs from the difficulty they labour under,—of having claimed a new invention, which claim, in fact, is distinctly found against them.

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Rule absolute, to enter the verdict for the defendant, on the second and third issues.

Bompas, Serjt., then proposed to argue the cross rule that had been obtained by the plaintiffs for a new trial; but

The COURT said, that the former part of that rule (to enter the verdict for the plaintiffs on the second and third issues) had been disposed of by the judgment just pronounced; and that the latter part (to grant a new trial) was only conditional—upon the Court being of opinion, that the verdict was incongruous and could not be entered for either party.

Rule for a new trial discharged.

CHARLES WYNNE v. JULIUS WYNNE AND SARAH
HIS WIFE.

(4 Man. & G. 253—260; S. C. 3 Scott, N. R. 435; 11 L. J. C. P. 206; 9 Dowl. 901; 1 Dowl. N. S. 723.)

1841.
May 27.
1842.
May 7.
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A rent-charge is devised to B., the wife of A., not saying for her separate use. In replevin an avowry is made in the names of A. and B. for arrears of the rent-charge; and issue being joined upon the title to such rent-charge, the cause and all matters in relation to the rent-charge are referred to D., who awards that the arrears of the rent-charge, including as well those due when the action was brought, as arrears which accrued between the bringing of the action and the date of the reference, shall be paid to B. This is not an excess of authority, either by reason of the arrears accruing subsequently to the action being included in the sum awarded, or by reason of the payment being directed to be made to B. only.

The plaintiff having refused to pay the arrears to the wife, on the ground that the money had been demanded by and paid to the husband, the Court made absolute a rule for an attachment against him.

REPLEVIN. The defendants, in right of the defendant Sarah, avowed in respect of an annuity or rent-charge of 20*l.* given and bequeathed by the will of one Robert Watkin Wynne out of the mansion in which, &c. *' to the said Sarah the wife of the said Julius, during her life, or so long as her conduct and behaviour

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should be discreet, and meet with the approbation of the testator's wife, or which, in case of her death, should be approved of by the survivors or survivor of his said trustees ;" alleging a compliance with the condition, and avowing the taking of the goods, as a distress for 50*l.*, being arrears of the annuity for two years and a half, ending the 2nd of March, 1839.

Pleas in bar : first, that after the death of the testator and before the accruing due of the arrears, the conduct and behaviour of the said Sarah was not discreet, but on the contrary thereof, on the 2nd of March, 1816, and from thence, &c. she the said Sarah was living in open, avowed, and notorious adultery, and in a state of polygamy with one J. R. Hutton, &c. Verification.

Secondly, that after the death of the testator and his wife, and before the accruing due of the said arrears, the conduct and behaviour of the said Sarah was not discreet, nor was the same approved of by the surviving trustee ; and that before the taking of the distress, the surviving trustee disapproved of the conduct of the said Sarah ; whereby the annuity wholly ceased ; concluding to the country.

Replication to the first plea in bar,—that after the marriage of the said Sarah with the said Julius, and more than seven years before the said Sarah committed any adultery with the said J. R. Hutton, &c., and more than seven years before the said Sarah was married to the said J. R. Hutton, the said Julius absented himself from the said Sarah for the space of ten years and upwards ; and until the time of the marriage of the said Sarah with the said J. R. Hutton, and from thence continually until the accruing due of the said arrears, and at the time of the said intermarriage of the said Sarah with the *said J. R. Hutton, the said Sarah had no knowledge of the said Julius being alive. To the second plea in bar the *similiter* was added.

Demurrer to the replication to the first plea in bar ; and joinder.

Upon the cause coming on for trial at the last Spring Assizes for the county of Denbigh, a verdict was entered for the plaintiff under a rule of Court, and the cause, and all matters in relation to the annuity in question in the cause, were referred to a barrister ; the costs of the cause to abide the event and determination of the award, and the costs of the reference to be in the discretion of the arbitrator. On the case being heard before the arbitrator, the defendants, in support of the affirmative of the issue as to the discreetness of the conduct and behaviour of Sarah Wynne, offered

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in evidence a certificate bearing date the 9th of January, 1822, and purporting to be signed by Colonel Wynne and another, the surviving trustees of the will of Robert Watkin Wynne. An objection was taken to this certificate, on the ground that Colonel Wynne himself might have been called. The arbitrator refused to receive it, and also rejected a subsequent certificate, likewise signed by Colonel Wynne, and dated the 6th of July, 1838, which was tendered on the part of the plaintiff to show that, at that time, Colonel Wynne, who had then become the only surviving trustee, disapproved of the conduct and behaviour of Sarah Wynne; the arbitrator remarking that the defendants had failed to prove the issue. It appeared by a decree in equity, dated the 23rd of December, 1816, given in evidence by the defendants, that the will of Robert Watkin Wynne was thereby ordered to be established, and the trusts thereof directed to be carried into execution; that by an order of the 5th of March, 1826, the receiver appointed in the equity suit was ordered to pay to Sarah Wynne the sum of 196*l.* in satisfaction of the then arrears of the annuity to the 2nd of March, 1826; and that the *receiver was also directed out of the rents and profits of the devised estates, from time to time, to pay the annuity of 20*l.* to Sarah Wynne for her sole and separate use during her life, or until the further order of the Court, by half-yearly payments; that in pursuance of that order the sum of 196*l.* was paid to Sarah Wynne, and that the growing payments of the annuity continued to be regularly paid by the receiver to Sarah Wynne, and into her own hands, from the 15th of March, 1826, until the 2nd of September, 1836; that John Wynne, the tenant for life of the estates charged with the annuity, died on the 19th of December, 1836, whereupon the plaintiff became, under and by virtue of the will of Robert Watkin Wynne, tenant for life of the estates; and that ever since he so came into the possession of the estates so charged, he had refused to pay the annuity to Sarah Wynne.

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On the 14th of May last the arbitrator made his award in the following terms. "I do award and declare that the plaintiff had not at the time of the commencement of the said action any cause of action against the defendants in respect of the matters so to me referred as aforesaid; and I do further award and direct that, instead of the verdict so found for the plaintiff, a verdict in the said action be entered for the defendants. And I do further award and direct that on the issue in law joined between the parties to

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the said action, judgment be entered for the defendants: and I do further award, order, and direct that the plaintiff forthwith shall and do pay unto the defendant Sarah, the wife of the defendant Julius Wynne, the sum of 50*l.*, as and for the arrears due on and up to the 2nd of March, 1839, of the annuity or yearly rent-charge of 20*l.* mentioned in the avowry of the defendants in the said action, and also the further sum of 40*l.* being the arrears of the said annuity or yearly rent-charge of 20*l.* from the 2nd of March, 1839, until the 2nd of March now last past: and lastly I do *award, order, and direct, that each of the said parties shall and do bear and pay his and their own costs of this reference, and one moiety of the costs of this my award."

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Channell, Serjt. now moved on the part of the plaintiff to set aside the award :

In the first place, the plaintiff was misled by the declaration of the arbitrator that the defendants had failed in establishing the issue which it lay upon them to prove. But for the arbitrator's remark, the plaintiff would have called evidence to show that Colonel Wynne, the surviving trustee, had disapproved of the conduct and behaviour of the defendant, Sarah.

(*ERSKINE, J.*: Is it sworn in your affidavits that the plaintiff would have called Colonel Wynne, if it had not been for the observation of the arbitrator?)

It is not so stated in precise terms.

(*MAULE, J.*: The case seems to have been left very bare by both parties. It is not improbable that the arbitrator may have been influenced by the presumption arising from the fact of the annuity being paid for so many years.)

A second objection is, that the arbitrator had no authority to direct payment of any arrears which accrued between the time of the distress and the order of reference on the 27th of March, 1841. It is clear that by the order of Court, all that was referred to the arbitrator was, the cause, and all matters in relation to the annuity in question in the cause, and that no authority was given to him over the annuity generally.

(*TINDAL, Ch. J.*: The part of the order to which you allude, is

merely matter of description ; the parties evidently meant to refer something more than the cause.)

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Thirdly, the cause is left undetermined ; for the arbitrator, instead of awarding payment of the arrears of the annuity to the two defendants, has directed them to be paid to the defendant, Sarah Wynne. The will of Robert Watkin Wynne does not give the annuity to her for her *sole and separate use. The claim for the return of the goods replevied is made by the two defendants, and, consequently, the plaintiff cannot with safety pay the 50*l.* to the wife. [*258]

(MAULE, J. : Although both the husband and wife are parties, the arbitrator has considered that the proper hand to receive the money is the wife's.)

TINDAL, Ch. J. :

Suppose the case of a husband being abroad—would an award be bad which directed a payment to be made to his wife ? We cannot but remember what passed upon a previous occasion (1). It is evident that the husband has been acting in collusion with the plaintiff, in order to deprive his wife of this annuity ; for it was not until he received an indemnity that he would permit his name to be used in this suit. The award of the arbitrator, that the money should be paid to the wife, was in accordance with the arrangement then come to between the parties. No authority has been cited that an award is bad for directing the payment to be made to the wife, and I see, therefore, no ground for setting aside this award.

The rest of the Court concurred.

Rule refused.

On the 3rd of July, 1841, judgment was signed for the 50*l.* and costs, and on the 7th the amount of the costs, 131*l.* was tendered to the attorneys of Sarah Wynne, and at the same time a receipt of Julius Wynne for 90*l.* was produced, acknowledging that the two sums of 50*l.* and 40*l.* mentioned in the award had been paid to him. The attorneys refused to receive the costs without *the sums [*259] awarded, and at length levied the 50*l.* and costs under a *fi. fa.*

(1) 2 Man. & G. 8 [where it was unsuccessfully objected upon demurrer to the avowry that the husband ought to have justified in his own right absolutely and not in right of his wife,—A. C.].

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Sir T. Wilde, Serjt., in Hilary Term last, obtained a rule *nisi* for an attachment against the plaintiff for non-payment of the 40*l.* to Sarah Wynne, pursuant to the award.

Channell, Serjt. now showed cause upon affidavits, which stated that the 40*l.*, together with the 50*l.*, had been demanded by Julius Wynne, the husband, and had been paid to him by the plaintiff.

Although the plaintiff might have been discharged by payment to the wife, he is not liable to an attachment for having paid it to the husband.

(TINDAL, Ch. J. : If he had paid the wife pursuant to the award, how could he have damnified himself? The payment to the husband was clearly collusive.

CRESSWELL, J. : All the parties entered into a rule of Court ; and, among others, the husband bound himself to abide the decision of the arbitrator. Can he get rid of the award? And, if not, how can the plaintiff?)

All that the husband consented to, was, that the wife should try the question as to her right to the annuity, but not that she should receive it.

(CRESSWELL, J. : That question was decided by the award.)

The objection is open to the plaintiff in resisting the attachment, for it appears on the face of the award.

Sir T. Wilde, Serjt., *contra*, was stopped by the Court.

TINDAL, Ch. J. :

The ground taken by the plaintiff is, that the husband permitted the wife to try her right to the annuity out of the funds of her friends, and yet, on the money being recovered, it is not to be paid to her. If the plaintiff has got himself into a difficulty, it is of his own creating. This is not a point of strict law, but is *rather an application to the equitable jurisdiction of the Court. The question is, what was intended by the proceedings which have taken place. It was evidently meant that the wife should enjoy the fruits of the action; and the plaintiff must have known that such was the

intention of the Court. The plaintiff never would have paid this money to the husband but from a determination to prefer him to the claims of his wife. The attachment must therefore go.

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The rest of the COURT concurred.

Rule absolute.

WILLIAM CRAWSHAY *v.* WILLIAM THOMPSON
AND OTHERS (1).

1842.
May 24, 26.

[357]

(4 Man. & G. 357—388; S. C. 5 Scott, N. R. 562; 11 L. J. C. P. 301.)

Case, for “wrongfully, knowingly and fraudulently” stamping bars of iron made by the defendants, with a stamp resembling one used by the plaintiff, which the defendants knew, and intended, to be in imitation of the plaintiff’s, and which was used by the defendants in order to denote that their iron was made by the plaintiff; and for knowingly, &c. selling the iron so marked as and for the plaintiff’s iron.

A correspondence between the parties was given in evidence, in which the plaintiff charged the defendants with using the mark in question, as being a fraud upon him; the defendants, in answer, asserted that they had used the mark for many years continuously. This was not so, in fact; but it was shown that the mark had been adopted by them in the execution of orders received from foreign correspondents: Held, that it was properly left to the jury to say; first, whether the defendant’s mark bore such a close resemblance to the plaintiff’s as was calculated to deceive the unwary, and to injure the sale of the plaintiff’s goods; and, secondly, whether the defendants used the mark with the intention of supplanting the plaintiff, or whether it was done in the ordinary course of business in execution of orders.

Held, also, that the notice of the resemblance of the mark given by the plaintiff to the defendants, did not, in the absence of proof of any intention to imitate it on the part of the defendants, give the plaintiff any cause of action.

The correspondence was commented upon by the counsel for the plaintiff in his reply, but not by the Judge in summing up. Held, that it was not necessary that it should have been commented upon by the Judge.

CASE. The declaration stated that the plaintiff, for divers years before and at the time of the committing of the grievances herein-after next mentioned, was an iron manufacturer and exporter of iron, and exercised and carried on, and still did exercise and carry on the business of an iron manufacturer and exporter of iron; and the plaintiff, in the way of his said business, did prepare, manufacture, make and sell, and still did prepare, &c., amongst other goods, divers large quantities of bars of iron, of a superior quality and description, which bars of iron the plaintiff during and at the time aforesaid was and still was accustomed to mark with a certain

(1) Cited in *Singer Manufacturing Co. v. Loog* (1882) 8 App. Cas. 15, 31, 52 L. J. Ch. 481; and *Derry v. Peek* (1889) 14 App. Cas. 337, 366, 58 L. J. Ch. 864; and see *Reddaway v. Banham* [1896] A. C. 199, 65 L. J. Q. B. 381.—A. C.

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stamp or mark, stamped or impressed on the said bars of iron respectively, of a peculiar form, shape and appearance, consisting of, *to wit, two Roman capital letters, that is to say, the letters W. C. (1), disposed and placed and enclosed within a certain oval figure or bracket in manner and form following, that is to say, (W C) ; in order to denote that the said bars of iron so respectively marked as aforesaid were, and each of them was, prepared, manufactured, and made by the plaintiff, and to distinguish them from all bars of iron prepared, &c. by other persons. And the plaintiff, during and at the time aforesaid had sold, and still did sell, divers large quantities of such bars of iron so by him made and marked as aforesaid. And whereas the plaintiff, before and at the time of the committing of the grievances thereafter next mentioned, had gained, acquired, and enjoyed great fame and reputation with the public, and also with divers foreign merchants in places beyond the seas, to wit, at Constantinople and Smyrna in Turkey, on account of the excellent quality of the said bars of iron so by him prepared, &c., and marked, and sold as aforesaid ; whereby the demand for the said bars of iron of the plaintiff so distinguished and marked as aforesaid was very great. And the plaintiff, by means of the premises before and until &c. had acquired and was acquiring divers great pains and profits by the sale of his said bars of iron so made and marked by him as aforesaid. Yet the defendants, well knowing the several premises, but wrongfully intending to injure the plaintiff in his sale of the said bars of iron, and to deprive him of the great gains and profits which the plaintiff might, and otherwise would, have acquired by preparing, manufacturing, marking, and selling such *bars of iron so by him made and marked as aforesaid, to wit, on &c., and on divers other days, &c., did wrongfully, knowingly and fraudulently, and against the will and without the consent or licence of the plaintiff, prepare, manufacture and make, and cause to be prepared, &c., divers, to wit, 200,000 bars of iron, of similar form to those of the plaintiff, and did wrongfully, knowingly and fraudulently, and without the consent or licence of the plaintiff, stamp or mark, and caused to be stamped or marked, the said bars of iron respectively with a certain stamp or mark, stamped or impressed on the said bars of

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(1) Both letters are of the Roman character, though W., as remarked by the LORD CHIEF JUSTICE on the motion for the new trial, is not, properly speaking, a Roman letter.

So, the Germans call all letters in our ordinary type Latin letters, as distinguished from German, i.e., black-letter.

iron respectively in imitation of the plaintiff's said stamp or mark, and of a form, shape and appearance very much resembling the form, shape, and appearance of the plaintiff's said stamp or mark, to wit, consisting of two Roman capital letters; that is to say, the letters W. O., disposed, and placed, and enclosed within a certain oval figure or bracket, in manner and form following; that is to say, (W O); and which last-mentioned mark the defendants then well knew and intended to be in imitation of, and similar in appearance to, the said mark so used by the plaintiff in that behalf as aforesaid; and was (*sic*) by the defendants so used and stamped or impressed on the said bars of iron respectively, in order to denote that such bars of iron so by them prepared, manufactured, made and marked as aforesaid, were respectively of the genuine manufacture of the plaintiff, and were respectively bars of iron prepared, manufactured and made by the plaintiff; and the defendants did knowingly, wrongfully, and fraudulently, and against the will of the plaintiff, and without his licence or consent, sell for their own lucre and gain the said bars of iron so by them prepared, manufactured, made and marked as aforesaid, as and for and under the false colour and pretence that the same were respectively bars of iron *of the genuine manufacture of the plaintiff, and so respectively prepared, manufactured and made by him as aforesaid; whereas, in truth and in fact, the plaintiff had never prepared, manufactured or made the said bars of iron, or any of them, or any part thereof. By means of which said several premises, the plaintiff had been and was wrongfully and unjustly hindered and prevented by the defendants from selling and disposing of divers large quantities, to wit, 200,000 of his said bars of iron, so by him prepared, manufactured and made as aforesaid, of great value, to wit, &c., which the plaintiff would otherwise have disposed of, and had been and was deprived of divers great gains and profits, which would otherwise have accrued to him from the sale thereof. And also by means of the premises, divers persons in parts beyond the seas, to wit, in Turkey aforesaid, had been induced to buy, and had bought, divers large quantities of the said bars of iron so made, marked and sold by the defendants as aforesaid, as and for bars of iron respectively of the genuine manufacture of the plaintiff, and also had been and were induced to believe, and did suppose, that the said bars of iron so made, marked and sold by the defendants as aforesaid, were respectively bars of iron made and marked, and sold, by the plaintiff as aforesaid. And because

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the said bars of iron so made, marked and sold, by the defendants as aforesaid, were respectively of inferior quality to those so made, &c., by the plaintiff as aforesaid, the said fame, credit and reputation, with the public, of the said plaintiff, had been and was greatly prejudiced and deteriorated; and also, by means of the premises, the plaintiff had been and was greatly injured and damnified in his said business, and otherwise; to the damage of the plaintiff of 30,000*l.*, &c.

Plea: Not guilty.

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At the trial before Tindal, Ch. J., at the sittings *for London after last Michaelmas Term, the following facts were proved in evidence. The plaintiff was an iron manufacturer and the proprietor of extensive iron works near Merthyr Tidvil in South Wales. The defendants were also iron manufacturers and proprietors of iron works in the said neighbourhood: one of which was called "The Tredegar," another, "The Aberdare," and a third, "The Penydarran Iron Works." They also carried on the business of iron merchants. It is the custom in the iron trade for the different iron masters to mark the iron made by them with a peculiar mark of their own; (generally a letter or letters, having some reference to the names of the maker, or of the place where the iron is made). The plaintiff, and his father before him, had been for some years past in the habit of marking their bars of iron with their initial letters, placed in an oval thus—(W C). The marks usually adopted by the defendants were the words "Aberdare" and "Penydarran" upon the iron made at these places; and the letters c. T. o. upon that made at Tredegar. Since the peace in 1815, a large trade for iron had grown up between this country and Turkey and Greece (which had previously been supplied by Russia), and the plaintiff's iron, marked (W C), was in great estimation in the Turkish market, where the mark in question was generally known as "the comb mark." It appeared to be the custom for several merchants to order iron from different English manufacturers, stamped with particular marks, differing from their own private marks. In the year 1837, the defendants received from a Mr. Kerr, a Turkish merchant in London, an order for a quantity of iron to be shipped by a certain vessel, and such iron was directed to be stamped W with a little o in an oval (W^o). This order was executed at the Aberdare works; but the stamp was made W with a dot in an oval (W[.]). The plaintiff happening to be there at *the time, saw some of the iron so marked, and remonstrated with the defendant's

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manager on the alleged similarity of the mark to his own. No further notice was taken at that time; and the defendants, in execution of other orders, continued to supply iron stamped with the foregoing letters, which were afterwards varied, according to orders, to W with a large O, in an oval, thus; (W O). This latter mark was not used till 1838.

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In March, 1839, the plaintiff addressed a letter to the defendant Thompson, in which he complained of the continued use of the stamp, which he designated as “a palpable fraud” upon him. The defendant Thompson, in his answer (dated April in the same year), said, “I most readily admit that my house has for many years continuously made iron for the Turkish market, stamped (W.) and (W) (and also other marks), and I conceive they are perfectly justified in so doing:” and, he added, “I believe the whole of the iron now made, or nearly so, for the Turkish market, is stamped in that form at whatever works it may be manufactured.” Further correspondence took place between the parties; and in one of his letters, the defendant Thompson, referring to the mark in question, said: “In fact, it is a foreign mark (Russian), in corroboration of which you can find original and unequivocal testimony, if you make inquiry in the proper quarter.” The use of the stamp was not discontinued by the defendants, but they used it only in the execution of foreign orders. Other manufacturers had used somewhat similar marks, having been ordered to do so for the Turkish market. The earliest instance proved was in the year 1834, when Messrs. Bailey, an English firm, were ordered by a house in Constantinople to manufacture some iron, and stamp it (O M) (which, when inverted, would have the appearance of (W O)). This, the writer said, was the mark of a particular iron *much in request, and which he stated to be the original mark of the Constantinos. The Constantinos were a Turkish firm, who were supplied by the plaintiff with iron marked (W C). There was no evidence to show that any person had been actually deceived by the mark used by the defendants; but one witness stated that, possibly, in Asia Minor, it might be taken for the plaintiff’s mark.

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The LORD CHIEF JUSTICE left it to the jury to say; first, whether they were satisfied that the defendants’ mark bore such a close resemblance to the plaintiff’s as, in its own nature, was calculated to deceive the unwary, or persons who were moderately skilled in the article, and to injure the sale of the plaintiff’s goods; and, secondly, what was the intention of the defendants in using the

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mark complained of—whether it was for the purpose of supplanting the plaintiff, or done in the usual course of trade, and in execution of foreign orders sent to their house; because, his Lordship said, it seemed to him, that, unless there were such a fraudulent intention existing (at least before notice), and it were proved to the satisfaction of the jury, the defendants would not be liable. His Lordship did not advert to the defendant Thompson's statement in his letter of April, 1839, that his house had been "for many years continuously" in the habit of using the mark in question; but it had been fully commented upon by the counsel for the plaintiff as a misstatement in point of fact. The effect of the notice contained in the plaintiff's letters, of the resemblance of the marks, with reference to the defendants' continuing to use them after such notice,—supposing the previous use to be found by the jury to have been innocent,—was reserved by his Lordship, as a point of law, for the consideration of the Court.

The jury returned a verdict for the defendants.

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Shee, Serjt., in last Hilary Term (1), obtained a rule *nisi* for a new trial on the ground of misdirection, and of the omission of the LORD CHIEF JUSTICE to comment upon the misstatement in defendant Thompson's letter, as to the continuous use of the mark in question (2). He cited *Blofield v. Payne* (3), *Polhill v. Walter* (4), *Foster v. Charles* (5), *Sykes v. Sykes* (6), *Millington v. Fox* (7), *Smith v. Pelah* (8), Com. Dig. Action on the case for negligence, (A. 5).

Sir T. Wilde, *Bompas* and *Channell*, Serjts., now showed cause :

First, as to the misdirection. If there was no semblance between the plaintiff's and the defendants' mark, calculated to deceive any one, there is no pretence for the action. The notice of the alleged resemblance can have no effect in this point of view; for, in fact,

(1) January 13th. Before Tindal, Ch. J., Coltman, Erskine, and Maule, JJ.

(2) The case was also moved on the ground that the verdict was against evidence, but on showing cause, the LORD CHIEF JUSTICE said, he thought the question was so entirely for the jury, that the Court ought to be relieved from the consideration of that

point.

(3) 38 R. R. 270 (4 B. & Ad. 410; 1 Nev. & Man. 353).

(4) 37 R. R. 344 (3 B. & Ad. 114).

(5) 31 R. R. 446 (6 Bing. 396; 7 Bing. 105; 4 Moo. & P. 61, 741).

(6) 27 R. R. 420 (3 B. & C. 541; 5 Dowl. & Ry. 292).

(7) 45 R. R. 271 (3 My. & Cr. 338).

(8) 2 Stra. 1263.

the marks used by the defendants had no tendency to injure the plaintiff, any notice by the latter cannot give the marks that character. The jury have found a general verdict, and may therefore have negatived the fact of resemblance. But assuming that a resemblance did exist, then the second question was properly left by the LORD CHIEF JUSTICE, whether the marks were used by the defendants for the purpose of supplanting the plaintiff; or whether they were used *bonâ fide*, in the usual course of trade, pursuant to orders received from correspondents. The other side must argue, that it is *not necessary that the defendants should have known that the marks were calculated to deceive others, if, in fact, they were so calculated; but there is no authority for such a proposition. The intention of the party is an essential ingredient of the right of action. The cases cited when the present rule was obtained, fully support the summing up of the LORD CHIEF JUSTICE. [They cited *Sykes v. Sykes* (1), *Blofield v. Payne* (2), *Millington v. Fox* (3), *Blanchard v. Hill* (4), *Southern v. How* (5), *Scott v. Morgan* (6), *Foster v. Charles* (7), *Corbett v. Brown* (8), and *Polhill v. Walter* (9).]

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Shee, Serjt., in support of the rule :

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First, as to the misdirection. The defence set up was, that the defendants did not use the mark in question, with the view of imitating the plaintiff's mark, but in pursuance of orders received from abroad; and it was as to the sufficiency or insufficiency of this defence that the jury needed the direction of the Judge. No objection is taken as to the first point that was left, namely, whether the defendants' mark bore so much resemblance to the plaintiff's as to deceive the unwary, or persons of ordinary skill. The direction, however, should have stopped there, and the second point left for the consideration of the jury ought to have been omitted. This point was, as to the intention of the defendants in using the mark,—whether it was adopted for the purpose of supplanting the plaintiff, or in the usual course of trade and in the execution of orders. But it is submitted, that the motive or intention of the defendants in using the mark was immaterial, if

(1) 27 B. R. 420 (3 B. & C. 541; 5 Dowl. & Ry. 292).

(2) 38 B. R. 270 (4 B. & Ad. 410; 1 Nev. & Man. 353).

(3) 45 B. R. 271 (3 My. & Cr. 338).

(4) 2 Atk. 484.

(5) Poph. 144.

(6) 2 Keen, 212.

(7) 31 B. R. 446 (6 Bing. 396; 7 Bing. 105; 4 Moo. & P. 61, 741).

(8) 34 B. R. 615 (8 Bing. 33; 1 Moo. & Sc. 85; 1 Moo. & Rob. 108; 5 Car. & P. 363).

(9) 37 B. R. 344 (3 B. & Ad. 114).

CRAWSHAY consideration *of the Court; and it does not appear that he was
 THOMPSON. asked by counsel to comment upon the letters to the jury. And it
 [*379] appears to me, that, as far as those letters had any bearing upon
 the case, they were fully in evidence, and that their general
 effect was left for the consideration of the jury. I do not think,
 therefore, that there is any fault to be found with my Lord's
 direction.

With regard to the point of law that was reserved for the
 consideration of the Court, as to the effect of the notice from the
 plaintiff to the defendants, I agree that my brother *Shee*, in this
 view of the case, was warranted in assuming that the jury found
 there was a resemblance between the mark used by the plaintiff
 and that adopted by the defendants; and that such resemblance
 was calculated to mislead ordinary persons—or, in other words,
 that the jury had found in the affirmative of the first question left
 to them by the LORD CHIEF JUSTICE. Now, it is to be observed that
 this notice is somewhat equivocal in its terms. If it mean that
 the defendants must have known, that injury would necessarily
 result to the plaintiff from the continued use of the mark in
 question, that would give some colour to the argument which has
 been urged on the part of the plaintiff; but I think that is not so.
 A charge is made on the one side, which is not assented to on the
 other. And it amounts, therefore, to no more than a circumstance
 in the case upon which it was properly within the province of the
 jury to determine.

Upon the whole, I think the rule for a new trial should be
 discharged.

MAULE, J. :

I also think this rule should be discharged. The first question
 is, whether there has been any misdirection. Now, I agree with
 what has been said at the Bar, that, in order to see whether or
 [*380] *not there has been a misdirection, we must look at the pleadings
 and to the course of the evidence at the trial. The declaration
 alleges that the defendants fraudulently sold certain bars of iron
 “as and for, and under the false colour and pretence that the same
 were, respectively, bars of iron of the genuine manufacture of the
 plaintiff.” I rather think that the gist of the action is the selling
 iron of the defendants' manufacture as and for iron of the plaintiff's
 manufacture; and that this allegation would have been sustained
 if it had been shown that the defendants had sold their iron to

their correspondents for the purpose of being retailed, as of the plaintiff's manufacture. But there is a preceding allegation in the declaration, that the plaintiff having used a certain mark in the manufacture of his iron, the defendants knowingly manufactured their iron with a mark, in imitation of that used by the plaintiff, in order to denote that such iron was manufactured by the plaintiff. Now, I think the declaration might have been good without that allegation; and if that be so, then the question arises, whether, that allegation having been inserted in the declaration, it would be necessary to prove it; and I think such proof would be necessary; for it is an allegation of a particular mode of effecting the wrong complained of, and ought therefore to be proved as alleged. In an action on the case for diverting a watercourse, the plaintiff may declare generally; but if he state a particular mode of diversion, he is not at liberty to prove any other.

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The first question that was left by my LORD CHIEF JUSTICE was, in effect, whether the iron made by the defendants was made so as to imitate the iron of the plaintiff's; and I think that this was a material question, for the reasons just stated; and that, from the course of the evidence, that question would have been properly raised, even if the allegation as to the particular mode of *imitation had not been contained in the declaration. The plaintiff's case is, that the defendants made iron and marked it in such a manner, that it might be taken as the plaintiff's iron, and in that way represented it as the manufacture of the plaintiff; and this is, in effect, the same as an allegation that particular words had been used to convey such representation. The question whether the defendants sold their iron as the plaintiff's depends upon whether the mark itself represented that the iron was manufactured by the plaintiff. The question for the jury was, whether such a representation was in fact made. It was left to them to say, whether the mark was used by the defendants with an intention to deceive. And that was a proper question to leave to them; for if the mark was not so used, there was no such representation on the part of the defendants as is alleged in the declaration, and consequently the declaration was not proved.

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The next question submitted to the jury was, whether the defendants had sent the iron to Turkey for the purpose of supplanting the plaintiff in that market, or whether it was done in the ordinary course of business, and merely in the execution of foreign orders sent to their house; and his Lordship added that, unless

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such a fraudulent intention existed, the defendants would not be liable, at least not before notice was given. Now, looking at the course of the evidence, that was equivalent to putting the question whether the defendants had sold their iron as and for the plaintiff's; because, if they had done so, it would have had a natural tendency to supplant the plaintiff in the market; and then the intention to defraud would follow as a matter of law, as well as of common sense. It is difficult to conceive what other object the defendants could have had in selling their iron as and for the plaintiff's, than that of supplanting the plaintiff.

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Several cases were cited for the purpose of showing that it was not necessary to prove that the defendants intended to pass off their iron as the plaintiff's; but that, whatever may have been their motive in so doing, if they executed the orders of correspondents, knowing that by so executing them, their goods would be calculated to pass as the plaintiff's, the substantial part of the declaration was proved, and the defendants would be liable. The argument in effect amounts to this,—if the defendants sold their iron as and for the plaintiff's, they are liable, whatever may have been their motive for so doing. And I agree that this may be so. But I think that the LORD CHIEF JUSTICE did, in effect and substance, so direct the jury; for he told them to find for the plaintiff, if they considered that the defendants had sold their iron, as and for the plaintiff's. If a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure; that is the effect of *Polhill v. Walter* (1). The matter complained of in that case was, that the defendant had knowingly made a false representation as to his authority to accept a bill of exchange for another party; and that fact having been proved, and it also having been proved that the plaintiff had sustained an injury by reason of such false representation, the action was held to lie. So, in this case, if it had been proved that the defendants had, by any means, falsely and knowingly represented their iron as of the plaintiff's manufacture, the plaintiff would have been entitled to the verdict; but that, in effect, was the question that was left to the jury. So, in *Foster v. Charles* (2), the wrong complained of was, that a false representation had been knowingly *made by the defendant as to the circumstances of a third party, whereby the plaintiff was induced to employ such party, and that an injury had

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(1) 37 R. R. 344 (3 B. & Ad. 114). (2) 31 R. R. 446 (6 Bing. 396; 7 *Id.* 105; 4 Moo. & P. 61, 741).

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resulted to the plaintiff therefrom; and these facts being proved, it was held that the action was maintainable, without reference to the defendant's motives in making the statement. So here, the complaint is, that a false representation has been made by the defendants, whereby the plaintiff has suffered an injury; and the action will lie if that representation was made knowingly by the defendants; and that was the question left by my Lord to the jury.

But another point is insisted upon, namely, that after the letters had been given in evidence, showing a notice to the defendants that they were using a mark on their iron resembling the plaintiff's, the LORD CHIEF JUSTICE was wrong in leaving the second question to the jury. It is argued that, supposing the defendants marked their iron in a way calculated to deceive other parties, although they had no intention of doing so, yet if they were told that such was the effect of using the mark, and they still continued to do so, they are liable to an action. But I cannot quite accede to that position. If a party is merely told that by continuing to do a certain thing he may deceive others, and he continues to do the thing without any intention to produce that effect, I do not think that an action will lie against him—at any rate, certainly not in this form of declaration. The effect of the decision in *Millington v. Fox* (1), is, that the LORD CHANCELLOR thought the defendants would have been in the wrong if they had continued to use the plaintiff's marks after they had received notice from the plaintiffs. But why was this? because it was clearly *shown, and was indeed admitted by the defendants, that the use of this mark would have been an injury to the plaintiffs; and therefore, if, after the notice, they had continued to use the mark, they must have known of the injury they were doing to the plaintiffs. But here the question is, whether the notice to the defendants was improperly excluded from the consideration of the jury; and it is contended that the first question left by my Lord should have been the only one submitted to the jury. But it appears to me that the second question was properly left both upon the letters and upon the rest of the evidence. Nothing was withdrawn from the jury. If his Lordship had been desired to read the letters to the jury, he would probably have done so; though I do not think he would have been bound to do so, provided they were not withdrawn from the jury.

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I quite concur in the opinion that this rule should be discharged. As to the question with regard to misdirection, it appears that two questions were left by my Lord to the jury. The first was, whether there was such a close resemblance in the mark used by the defendants to that of the plaintiff as to be calculated to impose on the unwary, and injure the plaintiff's sale. Now it may be said that this perhaps was not a necessary ingredient in the proof to be given by the plaintiff. But it is to be observed, however, that there is a distinct allegation in the declaration, that the defendants "did wrongfully, knowingly and fraudulently stamp or mark the said bars of iron respectively with a certain stamp or mark, stamped or impressed on the said bars of iron respectively, in imitation of the plaintiff's said stamp or mark, and of a form, shape and appearance very much resembling the form, shape and appearance of the plaintiff's said stamp or mark, and which mark the defendants then well knew and intended to be in *imitation of, and similar in appearance to, the said mark so used by the plaintiff in that behalf as aforesaid, and was by the defendants so used and stamped or impressed on the said bars of iron respectively, in order to denote that such bars of iron so by them prepared, manufactured, made and marked as aforesaid, were respectively of the genuine manufacture of the said plaintiff, and were respectively bars of iron prepared, manufactured and made by the said plaintiff." Now, admitting that it was not necessary to prove the first allegation, still I think the direction to the jury was perfectly right; for there was nothing to support the declaration, and establish any representation by the defendants as to the iron being of the plaintiff's manufacture, but the evidence as to the similarity of the mark.

The other question left was, whether there had been any fraudulent intention on the part of the defendants to deceive customers by using this mark, or whether it was used innocently by the defendants in the course of the execution of orders without any intention to deceive; and I think it clear that the latter expression must have been understood as meaning without any fraudulent intention on the part of the defendants. This is in the nature of an action for deceit; and it is laid down in Com. Dig. tit. Action upon the case for a deceit (F. 3), that "the declaration regularly ought to charge that the defendant was *sciens* of the matter by which he deceived; and that he did it *falsò et*

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fraudulenter." There is an early case in illustration of this principle, cited by DODERIDGE, J. in *Southern v. How* (1), to this effect, as stated in Popham (2): "An action upon the case was brought in the Common Pleas by a clothier,—that, whereas he had gained great reputation for his making of his cloth, by *reason whereof he had great utterance, to his great benefit and profit; and that he used to set his mark to his cloth, whereby it should be known to be his cloth: and another clothier perceiving it, used the same mark to his ill-made cloth on purpose to deceive him; and it was resolved that the action did well lie." The same case is cited also in Cro. Jac. (3); but it is there said that the action was brought by him who bought the cloth; whereas in Popham, the action is said to have been brought by the manufacturer, and the gist of the action appears to have been the use of his mark "on purpose to deceive" (4).

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In *Polhill v. Walter* (5), and that class of cases, no intention to deceive was proved; but there we find falsehood in fact, with knowledge on the part of the defendant. Now what falsehood in fact is there in this case? Did the defendants falsely represent their iron *to be of the plaintiff's manufacture? That is the very question in the cause; and that was left to the jury. Lord TENTERDEN, in giving the judgment of the Court in *Polhill v. Walter*, observed, "If the defendant had had good reason to believe his representation to be true,—as, for instance, if he had

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(1) Poph. 143.

(2) P. 144.

(3) P. 471.

(4) The statement in Cro. Jac. is as follows: "A clothier of Gloucestershire sold very good cloth; so that, in London, if they saw any cloth of his mark, they would buy it without searching thereof; and another, who made ill cloth, put his mark upon it without his privity; and an action upon the case was brought by him who bought the cloth for this deceit, and adjudged maintainable." In Popham this decision is said to have taken place in 22 Eliz., and in Cro. Jac. in 33 Eliz.; but it is clearly the same case. In Com. Dig., Action on the case for deceit (A. 9), the case is thus referred to: "So, (i.e. an action will lie) if a clothier sell bad cloths, upon which he put the mark of another, who

made good cloths." Comyns does not say by whom the action may be maintained; but as he cites from Cro. Jac. only, it may be inferred that he considered the case as establishing the right of action in the purchaser, which it certainly would, supposing that report to be accurate. The report in Popham would appear more likely to be a true version of DODERIDGE's statement; since the case, as represented by Croke, would not have been very apposite to that of *Southern v. How*, in which it was cited by the learned Judge. Lord Rolle, however, expressly states, that DODERIDGE did not say whether the former action was brought by the clothier or by the vendee, but adds, "*Semble que gist pur le vendee.*" 2 Roll. Rep. 28.

(5) 37 K. R. 344 (3 B. & Ad. 114).

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acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery,—he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive.” The cases may be considered to establish the principle that fraud in law consists in knowingly asserting that which is false in fact, to the injury of another (1).

Can it be contended that the mere use of a similar mark will give a right of action? I do not know that a man can have an abstract right to use any particular mark; but long user in a trade of a mark may produce a general impression that goods bearing such mark are of a particular manufacture. The notice here,—although it was argued that it ought to have determined the case in favour of the plaintiff,—cannot alter the legal rights of the parties. *Millington v. Fox*, which was relied upon, does not establish that doctrine. What is the notice here? It is to the effect that the defendants were using a mark similar to that used by the plaintiff. But such a notice is not equivalent to knowledge; as the defendants might dispute the resemblance; or they might *admit the resemblance, and yet insist that they had no intention of passing off their goods as the plaintiff’s.

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As to the withdrawal of the letters from the jury, I do not think there is any reason for disturbing the verdict upon that ground. If they were commented upon by the counsel for the plaintiff as being evidence of facts, the LORD CHIEF JUSTICE certainly did not tell the jury that they were not such evidence; if they were used to establish a proposition of law, their effect was reserved for the consideration of the Court.

TINDAL, Ch. J. concurred.

Rule discharged.

(1) *Vide Pasley v. Freeman*, 1 R. R. 634 (3 T. R. 51); *Eyre v. Dunaford*, 11 R. R. 501, n. (1 East, 318); *Haycraft v. Creasy*, 6 R. R. 380 (2 East, 92); *Ames v. Millward*, 20 R. R. 603 (2 B. Moore, 713); *Adamson v. Jarvis*, 29 R. R. 503 (4 Bing. 66); *Lyde v. Bar-*

nard, 46 R. R. 269 (Tyr. & G. 250; 1 M. & W. 101); *Freeman v. Baker*, 39 R. R. 651 (5 B. & Ad. 797; 2 Nev. & Man. 446); *Swann v. Phillips*, 47 R. R. 626 (8 Ad. & El. 457; 3 N. & P. 447). And see 58 R. R. 446, n. (3 Man. & G. 475, n.), and 3 Man. & G. 82, n.).

BELL v. FRANKIS.

(4 Man. & G. 446—449; S. C. 5 Scott, N. R. 460; 11 L. J. C. P. 300.)

Where, in an action by the indorsee against the drawer of a bill of exchange, the defendant had told a witness he expected to receive by post a notice of its dishonour, and afterwards gave him a letter he received by post, and requested him to negotiate a renewal of the bill; and the letter, which had found its way to the plaintiff's hands, was not produced at the trial: Held, that the jury were warranted in finding no notice of dishonour had been given.

ASSUMPSIT, by the plaintiff, one of the public officers of the National Provincial Bank of England, against the defendant as drawer of a bill of exchange, indorsed by him to the Bank. The declaration alleged presentment, non-payment and notice in the usual form.

Pleas: first, that the defendant did not draw the bill; secondly, that he had not due notice of non-payment; *concluding to the country. Upon both of which issue was joined.

At the trial before Maule, J., at the sittings for London in last Term, it appeared that the bill, which fell due on the 22nd July, 1841, was on the day following returned dishonoured to the house of management in London. On the same day it was forwarded to the branch Bank at Worcester, and arrived there on the 24th; on which day the manager at that branch Bank forwarded it to Ledbury, where it arrived on the morning of the 25th, on which day the manager of the Ledbury Bank wrote a letter to the defendant. This letter was not produced at the trial, nor was any evidence given of its contents. But a witness was called, who stated that he met the defendant in Gloucester on the morning of the 25th of July, and was asked by him, to go with him to the post-office, as he expected to find a letter there respecting the dishonour of a bill. That they went together to the post-office, where the defendant received a letter which he handed to the witness, and desired him to take it to one of the other parties to the bill, to endeavour to get it renewed. That the witness did accordingly see the party in question, but the bill was not renewed, and the letter was ultimately handed over to the plaintiff's attorney.

The learned Judge having left it to the jury to say whether due notice of the dishonour of the bill had been given, they answered in the negative; and a verdict was accordingly entered for the defendant.

Bompas, Serjt., had applied for a rule for a new trial, on the ground that it should have been left to the jury, that the defendant's

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admission dispensed with direct evidence of notice ; and also that the verdict was against the evidence. The Court intimated that it was a proper question for the jury ; and that it had been *properly left to them ; but they granted a rule *nisi* on the second point.

Talfourd, Serjt. now showed cause :

It was formerly considered that a promise to pay a bill amounted to an admission of the receipt of notice of its dishonour. But it is now properly considered a question for the jury, whether notice has or has not been given, although undoubtedly they may infer it from such a promise : *Hicks v. Duke of Beaufort* (1). Here, the evidence falls far short of a promise to pay. * * The jury have expressly found that there was not notice. After *Solarte v. Palmer* (2), due notice of dishonour can hardly be inferred.

(COLTMAN, J. : If the inference is to be drawn that there had been notice, the defendant might show that the notice given was an insufficient notice.)

Bompas, Serjt. in support of the rule :

Many things relating to bills of exchange, that originally were considered as matters of fact, have now become matters of law : such as whether a notice is within reasonable time. Where a party distinctly acknowledges his liability on a bill by applying to have it renewed, that is a sufficient admission that he has received due notice of its dishonour. *It is very important that there should be a fixed and general rule upon the subject.

TINDAL, Ch. J. :

The jury have found, there was no notice of dishonour ; and under the circumstances of this case I do not think that there is any ground to disturb their verdict.

COLTMAN, J. concurred.

MAULE, J. :

At the trial I had at first some doubt whether there was any evidence at all of a notice of dishonour having been given to the defendant : but on consideration I thought that there was some evidence upon the point ; and the case was accordingly submitted

(1) 44 R. R. 700 (4 Bing. N. C. 229).

(2) 34 R. R. 34 (2 Cl. & Fin. 93 ; 1 Bing. N. C. 194 ; 7 Bing. 530).

to the jury. If they had found for the plaintiff, I do not say that they would have done wrong; but I think they have done quite right as it is. I am not dissatisfied with their verdict. The plaintiff might have proved the letter containing the notice, if any such notice was in fact given. By not so doing he justified the jury in coming to the conclusion at which they arrived upon the subject.

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CRESSWELL, J. was of the same opinion.

Rule discharged.

ASHCROFT AND OTHERS v. MORRIN AND ANOTHER.

(4 Man. & G. 450—452; S. C. 11 L. J. C. P. 265; 6 Jur. 783.)

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An order for goods "on moderate terms," is a sufficient memorandum within the seventeenth section of the Statute of Frauds.

ASSUMPSIT for goods sold and delivered. Plea: *Non assumpsit*.

At the trial, before Cresswell, J., at the London sittings after last Hilary Term, it appeared that the plaintiffs were coopers in London, and the defendants were storekeepers at St. Vincent's. The action was brought to recover 80*l.* 7*s.* 9*d.* for porter sold by the plaintiffs to the defendants. To prove the order, the following letter, addressed to the plaintiffs and signed by the defendants, was put in:

"ST. VINCENT, April 3rd, 1840.

"Messrs. W. ASHCROFT & SON,

"GENTLEMEN,—In our line of business we dispose of a good deal of malt liquor, &c., and Captain Neilson, of the ship *Emerald*, has recommended us to try your house for this article. We therefore annex you an order for what we will require just now, which please send by return of the *Emerald*. Let the quality be fresh and good, and on moderate terms. The *Emerald* will only be in London about ten days. The amount of invoice we will either pay to Captain Neilson or remit you in a bill, payable in London, as soon as we know the amount. We are, &c.

"JOHN and SAMUEL MORRIN."

To this letter the following order was annexed:—

"Order for porter, &c.

" $\frac{1}{4}$ 4 Hhds. porter.

$\frac{5}{8}$ 4 Barrels ditto.

$\frac{9}{12}$ 4 Punchns. or butts brown stout ditto.

$\frac{1}{4}$ 2 Hhds. ale or beer, not the weakest, but a good body.—

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The goods were shipped on board the *Emerald*, which vessel was wrecked on her voyage out.

On the part of the defendants it was contended that there was no sufficient note or memorandum of the bargain, within the seventeenth section of the Statute of Frauds (1), inasmuch as no price was mentioned in the order; and also that the acceptance by the captain of the *Emerald* was not an acceptance by the defendants within that section: *Hanson v. Armitage* (2). The plaintiffs were nonsuited; but leave was reserved to them by the learned Judge to move to set aside the nonsuit and to have a new trial.

Channell, Serjt. obtained a rule *nisi* for a new trial on the first point, contending that the defendants' letter was a sufficient note within the statute.

Bompas, Serjt. now showed cause:

The alleged contract was only an order for goods, without naming any price. It cannot, therefore, amount to a contract, for a contract to be valid must be binding on both sides.

(CRESSWELL, J.: A written proposal accepted by parol has been held sufficient (3). This case resembles *Elmore v. Kingscote* (4), where no price was mentioned.)

TINDAL, Ch. J.:

The order here is, to send certain quantities of porter and other malt liquor on "moderate terms." Why is not that sufficient? That is the contract between the parties.

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The other Judges concurring,

Rule absolute (5).

(1) 29 Car. II. c. 3, and Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 60, and sched. See now sect. 4 of that Act.—A. C.

(2) 24 R. R. 478 (5 B. & Ald. 557). See also *Astey v. Emery*, 16 R. R. 460 (4 M. & S. 262).

(3) In *Boydell v. Drummond*, 10 R. R. 450 (11 East, 142), it was held, that, although a contract may be collected from several different documents, provided the connection appear on the face of them, such connection cannot be supplied by parol evidence.

(4) 29 R. R. 341 (5 B. & C. 583; 8 Dowl. & Ry. 343).

(5) If a specific price be agreed upon, it must be mentioned in the contract: *Elmore v. Kingscote*, *ubi supra*. See also *Kain v. Old*, 26 R. R. 497 (2 B. & C. 627, 633); *Acetal v. Levy*, 38 R. R. 469 (10 Bing. 376, 383). But if no price be agreed upon, the contract will be understood to be for a reasonable price; and in a declaration upon such contract no price need be stated: *Hoadly v. M' Laine*, 38 R. R. 510 (10 Bing. 482).

BROWN AND ANOTHER v. LANGLEY.

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(4 Man. & G. 466—473; S. C. 5 Scott, N. R. 249; 12 L. J. C. P. 62.)

A. borrowed a sum of money from a Loan Society, and the defendant joined him in a joint and several promissory note for the amount. At the time of the loan a printed book of the Society's rules was given to the defendant. By these rules it was stated, that after default by the principal, notice would be given to the surety, and that if the money was not then paid, legal proceedings would be taken. The book was not signed:

Held, that these rules did not constitute an agreement in writing contemporaneous with the note, so as to be admissible to vary the contract on the note.

Semle, that if the rules had been admissible as such an agreement, they would not have sustained a plea, alleging "that if the money was not paid after notice to the surety, legal proceedings would be taken, but not before."

DEBT, by the payees against the maker of a promissory note, dated the 18th of November, 1840, for 10*l.*, payable at two months date.

Pleas: first, *non fecit*; whereupon issue was joined. Secondly, that the note was made by the defendant, and delivered to the plaintiffs as trustees and agents to a Society of persons whose names were to the defendant unknown, carrying on business, as a Loan Society, by the name of "The Holborn Loan and Investment Society," for the purpose of securing to the plaintiffs, as such trustees and agents, the repayment of a certain loan and sum of money, to wit, 9*l.* 4*s.*, then lent and advanced by the said Society to one Richard Thornton, together with certain interest thereon; that it was at the time of lending the said money, and of making the said note, to wit, on the 18th of November, 1840, agreed in writing between the plaintiffs, the defendant, the said R. Thornton, and the said Society, that the said loan and interest, *amounting together to 10*l.* 4*s.*, should be repaid to the said Society by R. Thornton, by instalments of 4*s.* each; the first instalment to be paid on Thursday next after the said loan was granted, and to be continued on each succeeding Thursday until the whole of the said sum of 10*l.* 4*s.* should be repaid; and that if R. Thornton should make default in payment of two instalments, notice by post or otherwise should be sent to him; and that if he did not pay the arrears within the time therein specified, the defendants should be written to; and that if the money was not paid according to such letter or notice, legal proceedings should be taken upon the said note, but not before; that the defendant then made the said note and delivered the same to the

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admission dispensed with direct evidence of notice ; and also that the verdict was against the evidence. The Court intimated that it was a proper question for the jury ; and that it had been *properly left to them ; but they granted a rule *nisi* on the second point.

Talfourd, Serjt. now showed cause :

It was formerly considered that a promise to pay a bill amounted to an admission of the receipt of notice of its dishonour. But it is now properly considered a question for the jury, whether notice has or has not been given, although undoubtedly they may infer it from such a promise : *Hicks v. Duke of Beaufort* (1). Here, the evidence falls far short of a promise to pay. * * The jury have expressly found that there was not notice. After *Solarte v. Palmer* (2), due notice of dishonour can hardly be inferred.

(COLTMAN, J. : If the inference is to be drawn that there had been notice, the defendant might show that the notice given was an insufficient notice.)

Bompas, Serjt. in support of the rule :

Many things relating to bills of exchange, that originally were considered as matters of fact, have now become matters of law : such as whether a notice is within reasonable time. Where a party distinctly acknowledges his liability on a bill by applying to have it renewed, that is a sufficient admission that he has received due notice of its dishonour. *It is very important that there should be a fixed and general rule upon the subject.

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TINDAL, Ch. J. :

The jury have found, there was no notice of dishonour ; and under the circumstances of this case I do not think that there is any ground to disturb their verdict.

COLTMAN, J. concurred.

MAULE, J. :

At the trial I had at first some doubt as to the sufficiency of the evidence at all of a notice of dishonour to the defendant : but on consideration I am now satisfied that the evidence upon the point ; and

(1) 44 R. R. 700 (4 B. & C. 229).

borrower to meet the instalments regularly as they become due, to be made in the following manner :

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"On 10 <i>l.</i> 4 <i>s.</i> ; for twelve months 4 <i>s.</i>	} each week for which it is required, as may be agreed on :
"On 15 <i>l.</i>	
&c.	

and so in proportion to the amount and length of time.

"The repayments of the instalments to commence *the first Thursday after the loan is granted, and to be continued every succeeding Thursday, at the office, between the hours of ten in the morning and six in the evening, until the loan is repaid, at which time the borrower must produce his or her book, in which the repayment will be entered and the receipt acknowledged by the signature of the officer in attendance.

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"A fine of 1*d.* on each shilling per week for forbearance will be charged on such instalments as shall be in arrear.

"Notice by post or otherwise will be sent after the second default to the borrower ; and if the arrears be not paid by the time therein specified, the surety or sureties will be written to, for which 4*d.* will be charged for each letter to borrower, surety or sureties, post paid ; and if the money be not paid according to such letter or notice, legal proceedings will be taken against the several parties for the amount remaining unpaid.

"In order to give the necessary information to borrowers, these rules and regulations, with leaves properly ruled for entering the repayments, shall be published at the charge of 1*s.*, to be purchased by every person to whom a loan shall be granted."

It was contended, on the part of the plaintiffs, that as these rules were not signed, they did not constitute any such agreement in writing, as was alleged in the second plea ; or that, even if they did amount to such an agreement, the defendant could not avail himself of it to vary, by extrinsic evidence, the contract in the promissory note. The learned Judge was of opinion that as the book was handed to the borrower at the time of the loan, it might be considered as evidence of the agreement under which all parties acted with reference to the note.

It was admitted that Thornton had paid 5*l.* 4*s.* before action brought ; and it was proved that Orpwood (who *had also been sued) had since paid the residue, *minus* 1*s.*, which, by an arrangement between Orpwood and the plaintiffs, remained unpaid, in order that the latter might be able to proceed with the present action against the defendant, who had refused to pay the costs. The verdict,

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THOMPSON. consideration *of the Court; and it does not appear that he was asked by counsel to comment upon the letters to the jury. And it appears to me, that, as far as those letters had any bearing upon the case, they were fully in evidence, and that their general effect was left for the consideration of the jury. I do not think, therefore, that there is any fault to be found with my Lord's direction.

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With regard to the point of law that was reserved for the consideration of the Court, as to the effect of the notice from the plaintiff to the defendants, I agree that my brother *Shee*, in this view of the case, was warranted in assuming that the jury found there was a resemblance between the mark used by the plaintiff and that adopted by the defendants; and that such resemblance was calculated to mislead ordinary persons—or, in other words, that the jury had found in the affirmative of the first question left to them by the LORD CHIEF JUSTICE. Now, it is to be observed that this notice is somewhat equivocal in its terms. If it mean that the defendants must have known, that injury would necessarily result to the plaintiff from the continued use of the mark in question, that would give some colour to the argument which has been urged on the part of the plaintiff; but I think that is not so. A charge is made on the one side, which is not assented to on the other. And it amounts, therefore, to no more than a circumstance in the case upon which it was properly within the province of the jury to determine.

Upon the whole, I think the rule for a new trial should be discharged.

MAULE, J. :

I also think this rule should be discharged. The first question is, whether there has been any misdirection. Now, I agree with what has been said at the Bar, that, in order to see whether or

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*not there has been a misdirection, we must look at the pleadings and to the course of the evidence at the trial. The declaration alleges that the defendants fraudulently sold certain bars of iron “as and for, and under the false colour and pretence that the same were, respectively, bars of iron of the genuine manufacture of the plaintiff.” I rather think that the gist of the action is the selling iron of the defendants’ manufacture as and for iron of the plaintiff’s manufacture; and that this allegation would have been sustained if it had been shown that the defendants had sold their iron to

their correspondents for the purpose of being retailed, as of the plaintiff's manufacture. But there is a preceding allegation in the declaration, that the plaintiff having used a certain mark in the manufacture of his iron, the defendants knowingly manufactured their iron with a mark, in imitation of that used by the plaintiff, in order to denote that such iron was manufactured by the plaintiff. Now, I think the declaration might have been good without that allegation; and if that be so, then the question arises, whether, that allegation having been inserted in the declaration, it would be necessary to prove it; and I think such proof would be necessary; for it is an allegation of a particular mode of effecting the wrong complained of, and ought therefore to be proved as alleged. In an action on the case for diverting a watercourse, the plaintiff may declare generally; but if he state a particular mode of diversion, he is not at liberty to prove any other.

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The first question that was left by my LORD CHIEF JUSTICE was, in effect, whether the iron made by the defendants was made so as to imitate the iron of the plaintiff's; and I think that this was a material question, for the reasons just stated; and that, from the course of the evidence, that question would have been properly raised, even if the allegation as to the particular mode of *imitation had not been contained in the declaration. The plaintiff's case is, that the defendants made iron and marked it in such a manner, that it might be taken as the plaintiff's iron, and in that way represented it as the manufacture of the plaintiff; and this is, in effect, the same as an allegation that particular words had been used to convey such representation. The question whether the defendants sold their iron as the plaintiff's depends upon whether the mark itself represented that the iron was manufactured by the plaintiff. The question for the jury was, whether such a representation was in fact made. It was left to them to say, whether the mark was used by the defendants with an intention to deceive. And that was a proper question to leave to them; for if the mark was not so used, there was no such representation on the part of the defendants as is alleged in the declaration, and consequently the declaration was not proved.

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The next question submitted to the jury was, whether the defendants had sent the iron to Turkey for the purpose of supplanting the plaintiff in that market, or whether it was done in the ordinary course of business, and merely in the execution of foreign orders sent to their house; and his Lordship added that, unless

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It appears to me that the plea is not made out in the terms in which it is pleaded. First, the agreement is pleaded as being in writing, by which it must be understood that there was an express agreement in writing to the effect stated. But the link which is to bind the note and rules together is not in writing. Besides, if the book could be taken as the agreement between the parties I do not think that it would maintain the plea; which states that it was agreed that notice of non-payment by the principal should be sent to the sureties and that if they made default, legal proceedings should be taken upon the note, but not before. But there are no such negative words in the rule in question. The plea, therefore, fails upon both grounds.

COLTMAN, J. :

I am of the same opinion. There is nothing in writing to connect the note and the rules with each other; and consequently there is no valid agreement to vary the express contract on the face of the note. For it is a well-established rule that a party to a bill or note shall not be allowed to contradict or vary the express engagement he has thereby entered into, except by a contemporaneous agreement in writing.

MAULE, J. :

I can discover nothing in the book given in evidence that purports to be any agreement between the parties. In order to show that the rules were to have that effect, it was necessary to resort to extrinsic evidence; but that evidence not being in writing, there was no proof of any written agreement so as to support the plea in question.

CRESSWELL, J. concurred.

Rule absolute.

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ALEXANDER BRYMER BELCHER AND OTHERS v.
GEORGE CAPPER AND OTHERS.

(4 Man. & G. 502—552; S. C. 5 Scott, N. B. 257; 11 L. J. C. P. 274.)

By a memorandum of charter it was agreed that A. should let, and B. should hire A.'s vessel for six calendar months, during which time B. was to possess the entire and exclusive use and disposal of the whole reach and burthen of the vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and

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for the stowage of stores and provisions; that the master should from time to time, and as often as B.'s interest should require, take on board, and properly stow, all such lawful goods, to the extent of a full and complete cargo, as should be tendered to him for that purpose, and proceed therewith upon such lawful voyage or voyages as B. or his agents should direct him to do; and that he should deliver the said goods agreeably to the bills of lading; that the freight and primage for such goods should be payable to B. or his order; that in the event of the completion of the six months whilst the vessel was upon a voyage or after she had commenced taking goods on board for a voyage, the term of that agreement should be prolonged until the discharge of her cargo after her arrival at, or return to, a port in Great Britain; that the owners or masters should keep the vessel tight, and manned, and provisioned and fitted with necessary stores. In consideration whereof B. agreed to pay to A. at a certain rate per ton per month, to be paid by: one month's pay in advance in cash, one month's pay after the vessel should be entered outwards, one month's pay that day two months, and one month's pay at the expiration of each succeeding month, till the end of the term she might be employed, and the balance in cash on her final discharge, together with port charges &c.; that B. should have the privilege of putting in a master of his own appointment, he finding the cabin with all stores, and paying his wages, A. allowing whatever rate of wages A. paid his own master; and as the master was to be appointed by B. to superintend his interests, A. was not to be responsible for such master's acts and conduct, should he deviate from the charter, but B. was to be responsible to A. for the conduct and integrity of such master whilst he should have the navigation of the vessel: Held, that the possession of the vessel was given up by A. to B. during the continuance of the contract; that the master so appointed by B. was in possession of the cargo as his agent, and not as the servant of A.; that personal credit was given to B. for the payment of the hire of the vessel, and that no lien upon, or right of stoppage of, the goods, was reserved to the owner as a security for the payment of such hire.

Money having become due under the charter from B. to A., and A. having brought an action against B., it was agreed that A. should withdraw his action, and that B. should deliver to C. certain bills of lading for the homeward cargo and should empower C. to receive the proceeds thereof for the purpose of paying A. any freight due to him under the charter, the balance to be paid to B.'s account with C. A. withdrew the action, and B. empowered C. accordingly. Upon the arrival of the vessel, A., in his own right, and as agent for C., took possession of the cargo &c. At the time of making the agreement no part of the cargo was on board, nor were any of the bills of lading thereof in existence, nor were any such bills of lading at any time in the possession of A. or of B. or of C. Before the shipping of the cargo or the existence of the bills of lading, and before C. had any control over the cargo, and while B. was the apparent and reputed owner thereof, and whilst A.'s action was still pending, B. became bankrupt, and D. and E. were appointed assignees. The cargo was from the time of the shipping till the seizure thereof in the possession and control of D. and E., as assignees, and of one F., a master appointed by B. as their agent. Before the bankruptcy, however, certain goods had been provided and shipped by B.'s agents as part of the homeward cargo, and on his account; which goods were carried from Y. to Z., where, for the purpose of more conveniently loading the whole of the homeward cargo, they were landed before the bankruptcy of B., and remained there ready for shipment. Other goods, provided by B.'s agents at G., were also, before his bankruptcy, ready for

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shipment, on his account, as a further portion of the homeward cargo. Both sets of goods were shipped accordingly; after which A. took possession thereof for the purpose of paying himself such freight &c. :

Held, that the portion of the cargo which had been brought from Y. to Z., was sufficiently in the possession of B. at the date of the agreement, as part of the homeward cargo mentioned in that agreement, to bring it within the terms thereof, as equitably assigned to C. for the purpose therein mentioned.

Semble also, that if the rest of the goods were within the possession of B.'s agents and before his bankruptcy, set apart and definitely appropriated as part of the homeward cargo, a similar result would follow.

But held, that as B. was left in the sole possession and management of the cargo, with full power to dispose of, or gain credit upon, any portion of it, having parted with no document essential to his power of disposal, the cargo passed to D. and E., under the 6 Geo. IV. c. 16, s. 72 (1), as goods in the order and disposition of B. at the time of his bankruptcy.

ASSUMPSIT. The declaration stated that before the said Robert Stockdale became bankrupt, to wit, on the 23rd of October, 1839, [*503] by a certain charter-party *of affreightment memorandum of charter, then made between the defendants, therein described as George Capper and nephews, merchants in the city of London, and owners of the ship or vessel called the *Maas*, of the burthen of 137 tons, old measurement, or thereabouts, then on a voyage from London to Rotterdam and back to London, and the said Robert Stockdale, therein described as of London, merchant, the defendants agreed to let, and the said Robert Stockdale agreed to hire the said vessel [*504] for and during the term of six calendar months, *such term to commence fourteen days after the vessel should be ready to enter out at the Custom House upon the terms and conditions following; to wit, that during the said term of that agreement, or as therein-after provided, the said affreighter should possess the entire and exclusive use and disposal of the whole reach and burthen of the vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions; that the master should, from time to time, and as often as the interest of the said affreighter should require, take on board and properly stow all such lawful goods and merchandise to the extent of a full and complete cargo, if required, as should be tendered to him for that purpose, and proceed therewith upon such lawful voyage or voyages as he, the said affreighter, or his agents, should direct him so to do; and that he should deliver the said goods and merchandise agreeably to the bills of lading, the act of God, the Queen's enemies, and all

(1) Repealed by 12 & 13 Vict. c. 106, (46 & 47 Vict. c. 52), s. 44 (iii.).—
s. 1: see now Bankruptcy Act, 1883 A. C.

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and every danger and accidents of the seas, rivers, and navigation, of whatever nature and kind, during the said voyage, always excepted; that the freight and primage on all such goods, merchandise, bullion, or specie should be for, and payable to, the said affreighter or to his order; that all cargoes were to be brought alongside, and taken from alongside at shipper's risk and expense, and that in the event of the completion of the above-mentioned term of six calendar months, whilst the said vessel was upon a voyage or after she had commenced taking goods on board for a voyage, the terms of that agreement should be prolonged until the discharge of her cargo after arrival at, or return to, a port in Great Britain; at which place the final completion of that agreement was to take place, unless otherwise mutually agreed between the owners and affreighters; that during the aforesaid term *of that agreement the said owners or master should keep the said vessel tight, staunch, and strong, sufficiently manned, provisioned, and properly provided, and fitted with all stores necessary for the due performance of the voyage or voyages she might be sent upon; in consideration of which the said affreighter thereby agreed to pay, or cause to be paid, to the owners of the said vessel at and after the rate of 22s. per ton old measurement, per register, per calendar month for so long as she should be by him employed as aforesaid under that agreement; such consideration to be paid as follows, viz., by one month's pay in advance in cash, one month's pay after the vessel should be entered on board, one month's pay that day two months, and one month's pay at the expiration of each succeeding month till the end of the term she might be employed, thus leaving one month's pay in abeyance, and the balance, in cash, on her final discharge, together with all port-charges and pilotage, except in Great Britain; the master to be supplied with such cash as he might require for ship's disbursements, at any of his loading or discharging ports by the charterer's agent, free of commission, taking the master's draft upon his owners for the same; which amount was to be paid by the owners, or deducted from the balance of freight due to the vessel; and it was by the charter-party further understood and agreed, that in case of damage to the ship by stranding or other accident, fourteen running days were to be allowed by the said affreighter for the necessary repairs beyond that period; the monthly payments to be suspended until the said vessel should be sufficiently repaired to prosecute her voyage; and, in the event of the loss of the ship, the affreighter

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BELCHER was to pay the aforesaid rate of freight up to the time only when
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CAPPER. the vessel was lost, seen, or known to be in safety; but if the loss happened at sea, and the date could not be ascertained, then the charterer was to pay *half a month's hire. No goods were to be shipped that would not go down the hatchway. Dunnage, mats, boards, and nails, if required, to be found by the charterer. The vessel to be employed abroad, between the river Gambia and Sierra Leone, and between the Gambia and the Cape Verd Islands on the African coast, all inclusive; but not to be sent to any place where she could not lie afloat at any time of tide; and if ordered to London to discharge her homeward cargo, it would be in one of the regular docks, at the option of the charterer, the vessel to be entered and cleared outward, and reported on her return to London, by the said Robert Stockdale, free of charge; not to ship exceeding fifty tons weight of teak wood or timber, and no piece exceeding twenty-five cwt. The vessel to be ready for loading in the London Docks ten days after she should be cleared of her inward cargo from Rotterdam, provided she met with no accident requiring extensive repairs. The charterer to have the privilege of putting in a master of his own appointment, he finding the cabin with all stores and paying his wages, the owners allowing the charterer whatever rate of wages they paid their own masters. It was also, by the same charter-party, agreed and understood that as the master was to be appointed by the charterer to superintend his interest, the owners were not to be responsible for his acts and conduct, should he deviate from that charter-party; but the charterer held himself responsible to the owners for the said master's honest and correct conduct and strict integrity whilst he should have the navigation of their vessel. In the event of sickness or death from the effects of the climate, the time occupied in procuring substitutes was not to be deducted from the freight. The commission upon that charter was 2½ per cent., payable to Messrs. Leach and Clark. Penalty for non-performance of that agreement, 1,000*l.* Averment: that *the said charter-party being so made as aforesaid, afterwards, to wit on the 18th of December, 1839, in and by a certain memorandum or declaration in writing indorsed on the said charter-party and signed by the defendants and the said Robert Stockdale respectively, it was declared that the periods of payment of the said freight should be as follows: viz. one month's pay on the 10th of January, 1840, one month's pay on the 10th of March following, and one month's pay on the 10th

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day of every succeeding month during the remaining period of that agreement. Mutual promises to perform the charter and memorandum, with a further promise by the defendants to suffer and permit the master for the time being of the said ship or vessel to perform and fulfil all things by him to be performed and fulfilled as such master in pursuance of the said charter-party, and to suffer and permit the delivery, according to the terms of the said charter-party, of the cargo, goods, and merchandise which should be shipped on board the said ship or vessel in pursuance of the said charter-party, and to suffer and permit the said charterer to use the said ship or vessel according to the terms of the said charter-party and memorandum, during the continuance of the said charter-party and agreement therein contained, and during that time to possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions. Averment: that afterwards, and after the making of the said charter-party and memorandum thereon subscribed as aforesaid, and before the said Robert Stockdale became bankrupt, to wit, on the 1st of January, 1840, the said ship or vessel did arrive in the said port of London from Rotterdam aforesaid, and afterwards, to wit, on *&c. last aforesaid, the said ship or vessel was ready to enter out, and did enter out, at the Custom House according to the terms of the said charter-party, and the said Robert Stockdale did then, to wit, on the day and year last aforesaid, put in the said ship or vessel a master of his own appointment, to wit, one James M'Cormick, according to the terms of the said charter-party; and the said ship or vessel did sail and proceed on her voyage under the command of the said James M'Cormick, according to the terms of the said charter-party of affreightment, to wit, to Gambia and Sierra Leone and the Cape Verd Islands aforesaid, and to divers places on the African coast, between the river Gambia and Sierra Leone, and between Gambia and Cape Verd Islands; and the said vessel was not sent to any place where she could not lie afloat at any time of the tide; and the said master did afterwards, at the said several places, to wit, on the 1st of March, 1840, and on divers other days and times, between that time and the sailing of the said vessel for London, take on board and properly stow divers lawful goods and merchandise, in pursuance of, and according to, the terms of the said charter-party, to wit, to the

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extent of a full and complete cargo, and of great value, to wit, of the value of 10,000*l.*, and did then, to wit, on the 1st of August in the year last aforesaid, and after the bankruptcy of the said Robert Stockdale, proceed therewith on the homeward voyage of the said ship or vessel, to wit, to London aforesaid, according to the orders and directions of the plaintiffs as assignees as aforesaid; and the said ship or vessel being so loaded as aforesaid, did afterwards, and after the bankruptcy of the said Robert Stockdale, to wit, on the 1st of October, 1840, arrive at London, at one of the regular docks there, to wit, at the West India Docks there; and the said term of six calendar months in the said charter-party mentioned, was completed after the said vessel *had commenced taking goods on board for her said voyage, to wit, on the 15th of July, 1840, whereby the said agreement and the terms thereof were prolonged until the discharge of her cargo after her arrival at, or return to, a port in Great Britain. That the said Robert Stockdale, before he became bankrupt, and the plaintiffs as assignees as aforesaid, since the bankruptcy of the said Robert Stockdale, had respectively performed and fulfilled all things contained in the said charter-party and memorandum or declaration in writing, on their parts respectively to be performed and fulfilled, according to the true intent and meaning of the said charter-party and memorandum. Yet the defendants had not performed or fulfilled all things contained in the said charter-party and memorandum, on their parts and behalves, to be performed and fulfilled, and did not nor would suffer or permit the master for the time being of the said ship or vessel, to perform and fulfil all things by him to be performed and fulfilled as master of the said ship or vessel in pursuance of the said charter-party, and did not nor would suffer or permit the delivery of the said cargo, goods, and merchandise so, as aforesaid, shipped on board the said ship or vessel in pursuance of the said charter-party; but on the contrary thereof, although the said cargo, goods, and merchandise were, by the bills of lading thereof, made deliverable to the plaintiff Alexander Brymer Belcher, who, on the arrival of the said vessel, was, and from that time had been, ready to receive the same; and although the plaintiffs as such assignees as aforesaid, were then ready and willing to unload the same, to wit, in the West India Docks, being one of the said regular docks, and to take the same from alongside at the expense of them, the plaintiffs, and to deliver and cause the same to be delivered to the said A. B. Belcher, according to the said bills of lading; of all

which the defendants then, to wit, from *the time of the arrival of the said ship or vessel at London aforesaid, hitherto had notice, and were then during the time aforesaid often requested by the plaintiffs to suffer the same to be so delivered; and although the delivery of the said cargo, goods, and merchandise was not in any way hindered or prevented by the act of God, the Queen's enemies, or any danger or accident of the seas, rivers, or navigation of any nature or kind whatsoever; and although the said agreement in the said charter-party contained, being so prolonged as aforesaid, was then subsisting and continuing, and not terminated; they the defendants from the time of the arrival of the said ship or vessel, with the said cargo, goods and merchandise, hitherto had altogether refused to deliver, or to permit the said master of the said vessel or any other person to deliver the said cargo to the said A. B. Belcher, agreeably to the bills of lading, or to the plaintiffs; and had altogether hindered and prevented the delivery of the said cargo, goods and merchandise, or any part thereof to the plaintiffs, or any of them, and had detained, and still did detain the same, and every part thereof on board of the said ship or vessel, contrary to the true intent and meaning of the said charter-party and of the said memorandum. And that the defendants did not, nor would suffer the plaintiffs as assignees as aforesaid, after the bankruptcy of the said Robert Stockdale, to use or enjoy the said ship or vessel according to the terms of the said charter-party or of the agreement therein contained, or, during that time, to possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions; but that after the said bankruptcy, and after the arrival of the said ship or vessel as aforesaid, at London *aforesaid, and before the discharge of the said cargo, and the said ship not having discharged her cargo after arrival at, or return to a port in Great Britain, and during the continuance of the said charter-party and agreement therein contained, being so prolonged as aforesaid, to wit, on the said 1st October, 1840, the defendants altogether deprived the plaintiffs of the use and enjoyment of the said ship or vessel, and every part thereof; and the defendants themselves seized and took possession of the whole of the said ship or vessel, and excluded the plaintiffs therefrom; and to suffer the plaintiffs to possess the use or disposal of any part of the same, or

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to remove or unload the said cargo so being on board of the same, and occupying other parts thereof than the space occupied with the cabin, or the room for the use and accommodation of the crew, or for the stowage of the ship's stores or provisions, had altogether refused, and still did refuse, and from thence hitherto had kept and detained, and still did keep and detain possession of the whole of the said ship or vessel, so having on board the cargo, goods, and merchandise; aforesaid, contrary to the true intent and meaning of the said charter-party and memorandum: whereby the plaintiffs had been unable to obtain possession of the said cargo, or to unload or dispose of the same or any part thereof; and by reason of the premises the said cargo, goods and merchandise had been, and were greatly deteriorated, &c., and had become of no value; and the plaintiffs as assignees aforesaid, had been deprived of the use and possession of the said goods and merchandise, and of the profits, benefits, and advantages which they otherwise would have derived therefrom, and had wholly lost and been deprived of many advantageous, and profitable opportunities of selling and disposing of the same.

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The defendants pleaded, sixthly, that after the making *of the said charter-party and memorandum, and during the subsistence of the provisions thereof, and after the bankruptcy of the said Robert Stockdale, and after the arrival of the said ship or vessel at London, and before her final discharge, to wit upon the 28th of September, 1840, there was due and owing to the defendants, the said owners of the said ship or vessel, a certain large sum of money, to wit, 1,348*l.* 19*s.* 6*d.* for the use of the said ship or vessel, according to the terms of the said charter-party, and for the freight and carriage and conveyance of the said cargo, goods, and merchandise in the declaration mentioned, according to the terms and provisions of the said charter-party and memorandum, and a certain other sum, to wit, 1,570*l.* 0*s.* 1*d.* was payable to the defendants on the final discharge of the said ship or vessel according to the terms and provisions of the said charter-party and memorandum for the use of the said ship, and for freight and carriage and conveyance of the said cargo, goods, and merchandise to wit, on, &c. last aforesaid; yet the plaintiffs did not and would not then, to wit, on &c. last aforesaid, or at any other time, nor did the said Robert Stockdale, pay or offer to pay the said sums of money, or any part thereof, to the defendants; but the plaintiffs had always neglected and refused, and still did refuse, to pay the same, and the said sums of money

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were still due and unpaid respectively to the defendants; and, thereupon, and upon the refusal of the plaintiffs to pay the said sums of money respectively, the defendants did refuse to deliver, or to suffer or permit the said master to deliver, the said cargo to the said A. B. Belcher, and had hindered and prevented the delivery of the said cargo, goods, and merchandise to the plaintiffs, and had detained, and still did detain, the same on board the said ship, and had refused, and still did refuse, to suffer the plaintiffs to remove or unload the said cargo, and kept and detained, *and still did keep and detain possession of the whole ship or vessel so having on board the cargo, goods, and merchandise aforesaid, as they lawfully might for the cause aforesaid, and as and for a lien for the moneys so respectively due and payable according to the terms and provisions of the said charter-party and memorandum aforesaid; which were the same matters in the declaration in that behalf alleged, and therein supposed to be breaches of the promise and undertaking of the defendants. Verification.

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Special demurrer, assigning, among other causes, that it did not appear that the defendants at the time of committing the said breaches of promise, were in possession of the said ship or cargo, or in a situation to enforce their lien (1).

Seventh plea. As to so much of the declaration as related to the said supposed breaches of promise by the plaintiffs in their declaration alleged, wherein they complained of the defendants not suffering or permitting the master to perform and fulfil all things by him to be performed and fulfilled as master in pursuance of the said charter-party, and not suffering or permitting the delivery of the said cargo, goods and merchandise so shipped on board in pursuance of the said charter-party, and refusing to deliver, or to suffer, or permit the master, or any other person, to deliver, the said cargo to the said A. B. Belcher agreeably to the bills of lading, or to the plaintiffs, and hindering and preventing the delivery of the said cargo, goods, and merchandise to the plaintiffs, and detaining the same on board the said ship, contrary to the true intent and meaning of the said charter-party and memorandum, and not suffering the *plaintiffs as assignees after the bankruptcy of the said Robert Stockdale, to use or enjoy the said ship according to the terms of the said charter-party and memorandum, or to

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(1) Plaintiffs' points: "The plaintiffs will contend that the defendants had no lien upon the ship or cargo,

and they will also rely upon all or any of the causes of demurrer stated in the body of this demurrer."

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possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel with the exception therein mentioned, and the depriving the plaintiffs of the use and enjoyment of the ship, and seizing and taking possession of the whole of the said ship and excluding the plaintiffs therefrom, and refusing to suffer the plaintiffs to possess the use and disposal of any part of the same, or to remove or unload the said cargo, and keeping and detaining possession of the whole of the said ship or vessel so having on board the said cargo, goods, and merchandise,—that after the making of the said charter-party and memorandum, and during the subsistence of the provisions thereof, and after the bankruptcy of the said Robert Stockdale, and after the arrival of the said ship at London, to wit, on &c. last aforesaid, and before the final discharge thereof, the said cargo, goods, and merchandise were by the bills of lading thereof made deliverable to the plaintiff, A. B. Belcher, or his assigns, he or they paying freight for the same as customary, and although the said freight amounted to a large sum, to wit, 1,400*l.*; and although there was then due and owing to the defendants, owners of the said ship, for the use of the said ship, for freight and carriage and conveyance of the said cargo, goods, and merchandise a large sum of money, to wit, 1,348*l.* 19*s.* 6*d.*, according to the terms of the said charter-party and memorandum; and although a certain other large sum, to wit, 221*l.* 0*s.* 7*d.*, was payable to the defendants, the said owners of the said ship, on her final discharge, for use of the said ship, and for freight and carriage and conveyance of the said cargo, goods, and merchandise, according to the terms of the said charter-party *and memorandum, to wit, on &c. last aforesaid; and although the two last-mentioned sums so respectively due and payable to the defendants amounted to a large sum, to wit, to an amount not less than the amount of the said freight, to wit, to the sum of 1,570*l.* 0*s.* 1*d.*, payable as customary as in that behalf as aforesaid; yet the said plaintiff, A. B. Belcher, did not and would not then or at any other time, and the said other plaintiffs did not and would not pay or offer to pay the said sum above in that behalf mentioned, or any other sum for freight for the said goods as customary, or any part of such freight, but to pay the same or any part thereof neglected and refused, and had always hitherto neglected and refused, to wit, on &c. last aforesaid; and thereupon the defendants refused to suffer the delivery of the said cargo, goods, and merchandise, or to permit the master or any other person to deliver the

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same to the said A. B. Belcher or to the plaintiffs, and detained the same on board their said ship, and refused to suffer the plaintiffs to remove or unload the said cargo, and kept and detained possession of their said ship so having on board the said cargo, goods, and merchandise as they lawfully might for the cause aforesaid; which were the said supposed breaches of promises in the introductory part of this plea, and in the said declaration in that behalf alleged. Verification.

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Replication, that the said freight so payable according to the terms of the said bills of lading by the said A. B. Belcher, or his assigns, as in the said seventh plea mentioned, was payable to the said James M'Cormick so by the said Robert Stockdale appointed master of the said ship as aforesaid; and that at the time of the arrival of the said ship, and at the time of seizing, taking, keeping, and detaining possession thereof by the defendants as in that plea and in the declaration mentioned, and of their said refusal to suffer the delivery of *the said cargo, goods, and merchandise, continued to be such master, and the said last-mentioned freight was so payable to the said James M'Cormick as the master and agent of the said plaintiffs as assignees as aforesaid; the said last-mentioned freight being, by the terms of the said charter-party, payable to the affreighter of the said vessel, and the said last-mentioned freight not being payable to the defendants or to the said James M'Cormick, as their agent in that behalf; and that on the arrival of the said ship, to wit, on the said 1st of October, 1840, the plaintiffs as such assignees as aforesaid discharged the said A. B. Belcher from paying to the said James M'Cormick, and the said James M'Cormick from receiving from the said A. B. Belcher, the said last-mentioned freight, and then required the said James M'Cormick to deliver the said cargo, goods, and merchandise without payment of such freight in respect thereof; and the said James M'Cormick was then ready and willing to deliver, and, but for the hindrance, prevention, and refusal of the defendants in that behalf, and their so seizing and taking and keeping possession of the said ship and cargo, goods, and merchandise as in the said declaration aforesaid, would have then delivered the said cargo to the said A. B. Belcher according to the said bills of lading, and according to the requisition of the plaintiffs, without the payment of the freight aforesaid. Of all which premises the defendants before and at the time of the committing of the said breaches of promise in the declaration mentioned, or any of them, to wit, on &c. last aforesaid, had notice. Verification.

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Rejoinder : that the said James M'Cormick, the said master, was put in by the said R. Stockdale the charterer of the said vessel as aforesaid, of his own appointment, under and in pursuance of the privilege by the said charter-party of affreightment in that behalf, reserved and allowed, in manner and form as by the said charter-party *of affreightment in the declaration in that behalf was alleged, as the defendants' master of the said ship, and as their agent and servant in respect of the said ship; and the said James M'Cormick became and was the agent of the said plaintiffs as such assignees, in such manner, and to such extent as by the said charter-party of affreightment in the declaration in that behalf was alleged and not otherwise; and that the said James M'Cormick had no other possession, control, or disposal of the said cargo, goods, and merchandise than in the character of such master of the defendants' vessel so appointed as aforesaid; that although the freight for such goods and merchandise was, by the said charter-party, eventually payable to the said affreighter in manner and form as was in the said charter-party in the declaration in that behalf alleged, yet the said James M'Cormick so being such master of the defendants' ship, did, as their master of the said ship, and as their agent, by and with the knowledge and consent of the plaintiffs or (1) of their agent, lawfully authorised, sign the said bills of lading in the said plea mentioned, to wit on the day and year in that behalf in the said plea mentioned, and did thereby, on the behalf of the defendants undertake and promise that the said goods, wares, and merchandise in that plea in that behalf mentioned, should be delivered to the plaintiff A. B. Belcher or his assigns, he or they paying freight for the same, as customary, to the defendants; that at the time of the said signing of the said bills of lading, and thence hitherto a large sum of money, to wit, 311*l.* 6*s.* 6*d.* had become and was due and owing from the said R. Stockdale to the defendants according to the terms and provisions of the said charter-party; of which the plaintiffs then had notice; that after the said signing of the said bills of lading, according to the provisions of the said charter-party, divers other large sums of money become *due and owing to the defendants in respect of the said freight therein mentioned, before, and on, the arrival of the said ship, to wit on the day and year in the replication to the seventh plea in that behalf alleged, amounting to a large sum of money, to wit 1,000*l.*, and that at the time of the supposed breaches in the introductory

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(1) *Sic*; but not assigned as cause of demurrer.

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part of that plea mentioned, to wit on the day and year in that behalf therein mentioned, the plaintiffs had notice, and were informed by the defendants, that the said two sums of money therein mentioned, to wit the sums of 1,848*l.* 19*s.* 6*d.*, and 221*l.* 0*s.* 7*d.* were, according to the terms of the said charter-party and memorandum, due and payable respectively to the defendants, and were then unpaid, as therein in that behalf mentioned; and the plaintiffs were then by the defendants requested to pay the same, and the plaintiffs were and the said Alexander Brymer Belcher was then by the defendants requested to pay to them the said freight as customary, according to the terms of the bills of lading as aforesaid; and that they the defendants did not consent or agree that the said assignees should discharge the said A. B. Belcher from paying the freight or any part thereof. Without this, that the last-mentioned freight was not payable to the defendants, in manner and form as the plaintiffs had in their said replication to the said seventh plea in that behalf alleged; concluding to the country.

Special demurrer; and joinder.

Eighthly. The defendants pleaded as to so much of the declaration as related to the supposed breaches of promise alleged by the plaintiffs in their said declaration, wherein they complained of the defendants' refusal to deliver, or to suffer or permit the master to deliver, the said cargo to the said A. B. Belcher, or to the plaintiffs and of the defendants' detaining the same on board the said ship, and refusing to suffer the plaintiffs to remove or unload the said cargo so being on board the same,—*that after the making of the said charter-party and memorandum, and during the subsistence of the provisions thereof, and after the said ship or vessel had sailed and proceeded on her voyage, as in the declaration mentioned, and before the bankruptcy of R. Stockdale, to wit, on the 13th of May, 1840, a large sum of money, to wit, 311*l.* 6*s.* 6*d.* became and was due and owing from the said R. Stockdale to the defendants, according to the terms and provisions of the said charter-party and memorandum; and thereupon, to wit, on &c. last aforesaid, the defendants commenced an action against R. Stockdale to recover the last-mentioned sum; and thereupon, afterwards, and before the bankruptcy of R. Stockdale, to wit, on &c. it was mutually agreed between R. Stockdale and the defendants, that the defendants should withdraw their said action and all proceedings at law against R. Stockdale, and that R. Stockdale should deliver to one W. G. Colchester the bill of lading for

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the said intended homeward cargo, and should empower the said W. G. C. to receive the amount of the proceeds thereof, for the purpose of paying the defendants in the first place any freight that might be due to them on the said charter-party for the vessel, and the balance thereof to the account of R. Stockdale with W. G. C.; and afterwards, and before the bankruptcy of R. Stockdale, to wit, on &c. last aforesaid, in pursuance of the last-mentioned agreement, the defendants withdrew their said action and all proceedings at law against R. Stockdale, and R. Stockdale empowered, authorized, and licensed W. G. C. to receive the amount of the said proceeds, for the purpose aforesaid; that afterwards, and after the arrival of the said ship or vessel in London, on the 28th of September, 1840, a large sum of money, to wit, 1,348*l.* 19*s.* 6*d.* for freight, became and was due to the defendants on the said charter-party for the said vessel, and the said sum, still remained due and unpaid to the defendants; and thereupon, *to wit, on &c., the defendants, the said owners of the said ship or vessel, as well in their right as for and on behalf and as the agents of W. G. C., and with his consent, went on board of the said ship and took possession of the said cargo, goods, and merchandise in the declaration mentioned, being the said homeward cargo of the said ship or vessel for the purpose last aforesaid; and in such right, and as, such agents as aforesaid, in pursuance of such agreement, power and authority and licence, refused to deliver, or suffer or permit the said master to deliver, the said cargo to the said A. B. Belcher or to the said plaintiffs, and detained the same on board the said ship, and refused to suffer the plaintiffs to remove or unload the said cargo, so being on board of the same; as they lawfully might for the cause aforesaid; which were the said supposed breaches of promise in the introductory part of that plea, and in the declaration, in that behalf alleged. Verification.

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Replication, that at the time of making the agreement in the eighth plea mentioned, the said cargo, goods, and merchandise were not, nor was any part thereof, on board the said ship or vessel, and that the said bills of lading so agreed to be delivered to W. G. C. were not, nor were nor was any such bills or bill of lading, at the time of making the said agreement, made out or in any way in existence, nor had the same at any time come into the power, possession, or control of W. G. C., or the defendants, or R. Stockdale; and the said power, authority, and licence to receive the amount of the proceeds of the said cargo, so given by the said

R. Stockdale to W. G. Colchester, were so given at the time of making the said agreement, and before the shipping of the said cargo, goods, and merchandise, or the existence of any such bills of lading; that after the making of the said agreement, and before the said cargo, goods, and merchandise were so shipped on board the said ship or vessel, *and before any such bills of lading were in existence, and before the said licence, power, and authority had conferred, or could confer, upon the said W. G. Colchester any title to, or control over, the said cargo, goods, and merchandise, and before the arrival of the said vessel, and before the said cargo, goods, and merchandise or vessel were in any manner in the possession of the defendants or the said W. G. Colchester, and whilst the said R. Stockdale was the apparent and reputed owner of the goods and merchandise, and before the defendant had withdrawn the said action in the said eighth plea mentioned, and whilst the same was still pending, to wit, on the 13th of June, 1840, the *fiat* in bankruptcy against R. Stockdale, and under which he was and is such bankrupt as aforesaid, and under which the plaintiffs were appointed such assignees as aforesaid, was awarded, and the said R. Stockdale was found to be, and was, such bankrupt as aforesaid, and the plaintiffs were then, in due form of law, appointed such assignees as aforesaid; whereupon and whereby the said consent, power, and authority of the said R. Stockdale so given as aforesaid to the said W. G. Colchester, and the said agreement so made as, in the said last plea, aforesaid, between the defendants and R. Stockdale, were altogether revoked, annulled, defeated, and determined; of all which premises the defendants then and before the committing of the breaches of promise in the declaration mentioned or any of them, and before any exercise of the licence, power, or authority so given to the said W. G. Colchester as aforesaid, to wit, on &c. last aforesaid, had notice; that the said cargo, goods, and merchandise and vessel were, from the time of the same cargo, goods, and merchandise being shipped on board the said ship or vessel until the same were so seized and taken possession of by the defendants, as in the declaration mentioned, in the possession, order, custody, *and control of the plaintiffs as such assignees as aforesaid, and of James McCormick as the agent of the plaintiffs as such assignees as aforesaid; and that the plaintiffs had not in any way confirmed, sanctioned, or assented to the said agreement in the said last plea mentioned, or the said licence, power, or authority so given by the said R. Stockdale to the said W. G.

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Rejoinder. That before the bankruptcy of R. Stockdale, and before any revocation by him of the agreement, power, authority, and licence in the said last plea mentioned, to wit, on the 30th of May, 1840, divers large quantities of goods, wares, and merchandise were, and had been theretofore, provided by certain agents of R. Stockdale, and on his account, to wit, at Sierra Leone in Africa, and placed by them in and on board the said vessel as and for a part of the said homeward cargo of the said vessel, on account of the said R. Stockdale; which last-mentioned goods, wares, and merchandise were afterwards, and before the bankruptcy of the said R. Stockdale, to wit, on the 1st of June, 1840, brought in the said vessel from Sierra Leone to the river Gambia in Africa, and then and there unloaded and discharged from the said vessel, for the purpose of enabling the said vessel to proceed to take in divers quantities of timber, and for the purpose of more conveniently loading the whole of the homeward cargo in and on board the said ship; and the said last-mentioned goods, wares, and merchandise were landed on shore, to wit, on &c. last aforesaid, and before the bankruptcy of R. Stockdale, and there remained, to wit, until the shipment thereof as hereinafter mentioned, destined, prepared, and ready for shipment in and on board the said vessel, as and for a part of the said homeward *cargo of the said vessel, on account of the said R. Stockdale; that afterwards, and before the bankruptcy of R. Stockdale, to wit, on the 4th of June, 1840, divers other large quantities of goods, wares, and merchandise were, and had been theretofore, provided and prepared by certain agents of R. Stockdale, to wit, at the river Gambia in Africa, and were then by them prepared and destined and ready for shipment for or on account of R. Stockdale, and as and for a further portion of the said homeward cargo of the said ship or vessel; that afterwards, to wit, on &c. last aforesaid, the said goods, wares, and merchandise in this rejoinder to the replication to the last plea first and lastly above mentioned, were shipped on board the said ship or vessel, as and for the said homeward cargo thereof; and thereupon afterwards, to wit, on the day and year, and for the purposes and causes, and in the right and by the power, authority, licence, and consent, in the said last plea in that behalf mentioned, the defendants went on board and took possession of the said goods, wares, and merchandise therein lastly referred to, to wit, of the said homeward cargo of the said ship or

vessel, and refused to deliver or to suffer or permit the said master to deliver the said cargo to the said A. B. Belcher, or to the plaintiffs, and detained the same on board the said ship, and refused to suffer the plaintiffs to remove or unload the said cargo so being on board of the same; as they lawfully might for the cause aforesaid; and that these were the supposed breaches of promise in the introductory part of the said last plea mentioned. Verification, and prayer of judgment, if &c.

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Special demurrer; and joinder (1).

Channell, Serjt., in support of the demurrers to the pleas :

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The first question is, whether the sixth plea in which the defendants set up a lien on the cargo for freight, can be sustained : and that will depend on the construction to be put upon the charter-party. It is submitted that, by the charter-party, there was an absolute letting or hiring of the ship to the charterer, and consequently that the claim of lien cannot be supported. By the memorandum the defendants "agreed to let" and the charterer "agreed to hire" the vessel for six calendar months, upon the terms and conditions "that during the said term of that agreement as thereafter provided, the said affreighter should possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions." It is clear from these words that the intention of the parties was, to constitute the charterer the owner of the ship for the specified period. In *Hutton v. Bragg* (2), which is still considered as one of the leading cases on this subject, it was held that the owner of a

(1) Plaintiffs' points.

The plaintiffs will contend that the cargo, being in the reputed ownership of the bankrupt at the time of his bankruptcy, and subsequently, until the seizure by the defendants, in the possession and custody of the plaintiffs as assignees, and never having been in the custody of Colchester or the defendants, and the defendants not having abandoned their action, according to the terms of the agreement, such agreement not having been at all carried into effect at the time of the bankruptcy, and no bills of lading

being then in existence (all which things are admitted by the rejoinder to the replication to the last plea), the agreement, even if otherwise binding, became of no effect, and any authority conferred by it would be revoked; and this, notwithstanding certain goods might have been prepared and destined for the cargo before the bankruptcy; and the plaintiffs will also insist and rely upon all or any of the causes of demurrer stated in the body of this demurrer.

(2) 17 R. R. 431 (7 Taunt. 14; 2 Marsh. 339).

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vessel has no lien for the hire stipulated by the charter-party for the voyage on the goods shipped by the charterer; because the *latter is the owner of the ship for the voyage, and the first owner has no possession of the ship or goods, without which there can be no lien. The case of *Newberry v. Colvin* (1) is also a strong authority against the defendants. There the owners, among other things, covenanted that the ship should be taken into the service of one B. for a certain time, and B. covenanted to receive the vessel into his service during that time, and to pay for the use and hire of the said ship certain freight; and it was held (2), overruling the judgment of the Court of King's Bench, that these stipulations were equivalent to an actual demise of the ship, and that the effect of the charter-party was to make the freighter the legal owner of the ship *pro tempore*. Here, the charter-party, in addition to other expressions which of themselves are equivalent to a demise of the ship, contains actual words of demise. [He also referred to *The Master, &c. of the Trinity House v. Clark* (3), *Saville v. Campion* (4), *Tate v. Meek* (5), *Yates v. Railston* (6), *Christie v. Lewis* (7), *Campion v. Colvin* (8).]

[527] With respect to the seventh plea, the validity of that plea depends on the same question as that of the sixth; for the defendants cannot justify the detention of the cargo if they had no lien. The freight for the homeward cargo was payable to the charterer; the captain who was appointed by the charterer as his agent, having signed bills of lading making the goods deliverable to Belcher. As regards the rejoinder to the replication to the seventh plea, it is clearly bad; for all that it traverses is, an inference of law.

The eighth plea sets up an agreement by which Stockdale, before his bankruptcy, agreed with the defendants to deliver to Colchester the bills of lading for the homeward cargo, and to empower Colchester to receive the proceeds, to be applied as in the plea mentioned, and justifies the taking possession of the cargo under such agreement. To this plea the plaintiffs have replied, that at the time of the agreement no part of the cargo was on board the

(1) 33 R. R. 437 (7 Bing. 190; 4 Moo. & P. 876).

(2) 8 B. & C. 166; 2 Man. & Ry. 47. The judgment of the Court of error was confirmed by the House of Lords, 33 R. R. 454 (6 Bligh, N. S. 167; 1 Cl. & F. 283).

(3) 4 M. & S. 288.

(4) 21 R. R. 376 (2 B. & Ald. 508).

(5) 19 R. R. 518 (8 Taunt. 280; 2 B. Moore, 278).

(6) 19 R. R. 524 (8 Taunt. 293 2 B. Moore, 294).

(7) 23 R. R. 483 (2 Brod. & B. 410; 5 B. Moore, 211).

(8) 43 R. R. 581 (3 Bing. N. C. 17; 3 Scott, 338).

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vessel, nor any of the bills of lading in existence, and that before the shipping of the cargo or the existence of the bills of lading, and before Colchester had any control over the cargo, and while Stockdale was the apparent and reputed owner thereof, Stockdale became bankrupt, and the plaintiffs were appointed assignees, whereby the authority given to Colchester and the agreement with the defendants became revoked, &c. The rejoinder states that before the bankruptcy, and before any revocation of the agreement or authority, certain goods were shipped at Sierra Leone by Stockdale's agents, as part of the homeward cargo, which goods were carried to the river Gambia, where, for the more convenient loading of the whole cargo they were landed; and that other goods provided by Stockdale's agents at the river Gambia were, before his bankruptcy, ready for shipment, as a further portion of the homeward cargo; and that afterwards both sets of goods *were shipped on board the vessel as the homeward cargo thereof. It is clear that the rejoinder affords no answer to the replication; for it appears on the face of the pleadings that Colchester never was in the possession of the cargo under the agreement, or of the bills of lading, previously to the bankruptcy, and consequently that there is no assignment of the goods, at law or in equity, so as to prevent them, on Stockdale's bankruptcy, vesting in the plaintiffs as his assignees.

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Bompas, Serjt. (with whom was *Greenwood*), *contra* :

The tendency of the later decisions has been to increase the power of the ship-owner to hold the cargo until the freight has been paid. *Hutton v. Bragg* has been repeatedly overruled, and can no longer be considered as law. *The Master, &c. of the Trinity House v. Clark* was decided on the specific ground that the Government had a complete control over the vessel, rather than on the terms of the charter-party. No case has been cited at all analogous to the present, where the point determined was the broad question of lien. There are many cases where, although the charter-party contained words of demise, the ship-owner has been held to have a lien. [He referred to *Paul v. Birch* (1), *Mitchell v. Scaife* (2), *Birley v. Gladstone* (3), *Yates v. Railston* (4), *Yates v. Meynell* (5), *Faith v. The East India Company* (6) and *Small v. Moates* (7).]

(1) 2 Atk. 621.

(2) 16 R. R. 795 (4 Camp. 298).

(3) 15 R. R. 465 (3 M. & S. 205).

(4) 19 R. R. 524 (8 Taunt. 293;
2 B. Moore, 294).(5) 19 R. R. 527 (8 Taunt. 302;
2 B. Moore, 297).

(6) 23 R. R. 423 (4 B. & Ald. 630).

(7) 35 R. R. 613 (9 Bing. 574;
2 Moo. & S. 674).

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The eighth plea involves a question of considerable importance. The effect of the contract thereby disclosed is, to modify the charter-party, and, at all events, to make the homeward cargo liable for the freight. The contract set up is one which is by no means unusual, namely, to bind the cargo to pay the freight. As Stockdale could not pay the freight then due, he agreed to make the cargo liable. The answer attempted, is that Stockdale became bankrupt before the goods were put on board. But it is clear that the agreement amounted, in effect, to an equitable assignment of the goods. The plaintiffs contend that the goods were not bound by the agreement, as they were not specifically set out. The rejoinder, however, shows that although not on board, they were specifically appropriated for the cargo. In *Brown v. Heathcote* (1), one R. W. and his partner gave *a bond to H. for 1,200*l.* and the same day assigned by deed to H., or order, the goods in two ships then at sea; and also thirteen bills of lading and policies of insurance containing the said goods as a collateral security. The latter were indorsed to H., the former, not. Upon a bill brought by the assignee of R. W., who had become bankrupt, for these goods, insisting that R. W. acted as the visible owner, the ship and cargo not being put into the possession of H.; the Court was of opinion that every thing which could show a right to the ship and cargo being delivered over to H., R. W. could no longer be said to have the order and disposition of them within the meaning of the 21 Jac. I. c. 19, s. 11, and consequently that H. had a right to retain the ship and cargo till the principal sum and interest were paid. So in *Lempriere v. Pasley* (2), an assignment of goods at sea as a collateral security for a debt, and a subsequent indorsement of a bill of lading were held good, as against the assignees of the assignor, who had committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading. The principle of these cases was recognised in *Burn v. Carvalho* (3). *Hutchinson v. Heyworth* (4) is also a strong authority upon this point.

Channell, Serjt., in reply. * * *

Cur. adv. vult.

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TINDAL, Ch. J. now delivered the judgment of the Court :

This case came on upon demurrers by the plaintiffs to the sixth

(1) 1 Atk. 160.

4 Nev. & M. 889.

(2) 2 T. R. 485.

(4) 48 R. R. 530 (9 Ad. & El. 375;

(3) 48 R. R. 213 (1 Ad. & El. 883; 1 P. & D. 266).

plea, and to the rejoinders to the replications to the seventh and eighth pleas.

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The action was brought by the plaintiffs, as assignees of the estate and effects of Robert Stockdale, a bankrupt, for the breach of a charter-party of affreightment, made, before the bankruptcy of Robert Stockdale, between the defendants as owners, and Robert Stockdale as charterer, of the ship *Maas*. By the charter-party, as set out in the declaration, the defendants agreed to let, and Robert Stockdale agreed to hire, the ship *Maas* for and during *the term of six calendar months, such term to commence fourteen days after the vessel should be ready to enter at the Custom House, upon the terms and conditions, that during the term of that agreement, or as thereafter provided, the affreighter should possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions; that the master should, from time to time, and as often as the interest of the affreighter should require, take on board, and properly stow, all such lawful goods, to the extent of a full and complete cargo, if required, as should be tendered to him for that purpose, and proceed therewith upon such lawful voyage or voyages as he the said affreighter or his agents should direct him to do; and that he should deliver the said goods and merchandise agreeably to the bills of lading; that the freight and primage for such goods should be payable to the affreighter or his order; that in the event of the completion of the six months, whilst the vessel was upon a voyage or after she had commenced taking goods on board for a voyage, the term of that agreement should be prolonged until the discharge of her cargo after her arrival at, or return to, a port in Great Britain, at which place the final completion of that agreement was to take place, unless otherwise mutually agreed between the owners and the affreighter; the owners or master to keep the vessel tight and manned, provisioned and fitted with necessary stores; in consideration of which the affreighter agreed to pay to the owners at the rate of 22s. per ton per calendar month, for so long as she should be employed by him as aforesaid under that agreement; such consideration to be paid by one month's pay in advance in cash, one month after the *vessel should be entered outwards, one month's pay that day two months, and one month's pay at the expiration of each succeeding month till the end of the term she

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might be employed, thus leaving one month's pay in abeyance, and the balance, in cash, on her final discharge, together with all port-charges and pilotage, except in Great Britain; the master to be supplied with such cash as he might require for ship's disbursements at any of his loading or discharging ports, by the charterer's agent, free of commission, taking the master's draft upon his owners for the same; which amount was to be paid by the owners or deducted from the balance of freight due to the vessel. The declaration then states certain clauses for the suspension of the monthly payments, during interruptions of the voyage, for repairs, and for the ceasing of all payments in case the vessel should be lost, and other terms not material to the present inquiry; and then proceeds to set out a provision that the charterer was to have the privilege of putting in a master of his own appointment, he finding the cabin with all stores, and paying his wages, the owners allowing whatever rate of wages they paid their own masters; and that, as the master was to be appointed by the charterer to superintend his interests, the owners were not to be responsible for such master's acts and conduct should he deviate from the charter-party; but the charterer held himself responsible to the owners for the said master's honest and correct conduct, and strict integrity whilst he should have the navigation of their vessel. The declaration then proceeds to allege mutual promises in the usual general form, and a promise by the defendants to suffer and permit the master to perform all things by him to be performed as master in pursuance of the charter-party, and to suffer and permit the delivery of the cargo according to the terms of the charter-party, and to suffer and permit the *charterer to use the ship according to the terms of the charter-party during its continuance, and during that time to possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception of the space occupied with the cabin, together with room for the usual accommodation of the crew, and for the stowage of the ship's stores and provisions. The declaration then proceeds to aver that Stockdale had, before his bankruptcy, put in the ship a master of his own appointment; and that the ship proceeded on her voyage under his command; and that the master had, at certain places named, taken on board goods and merchandise according to the terms of the charter-party, and after the bankruptcy of the charterer proceeded therewith on the homeward voyage of the vessel, according to the orders and directions of the

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plaintiffs, assignees of the charterer; and that the vessel so loaded arrived at London at the West India Docks, the six months' term mentioned in the charter-party having expired after the commencement of the loading of the vessel, and the terms of the agreement having been thereby prolonged until after the discharge of her cargo at a port in Great Britain. The declaration then proceeds to allege performance by the bankrupt, and by the plaintiffs as assignees, and alleges as a breach of the defendants' promise, that they did not suffer or permit the delivery of the goods and merchandise shipped on board the vessel in pursuance of the charter-party; but, on the contrary thereof, although the goods were by the bills of lading thereof, made deliverable to the plaintiff Alexander Brymer Belcher, who, on the arrival of the vessel, was, and thence hitherto hath been, ready to receive the same; and, although the plaintiffs, as such assignees, were then ready and willing to unload the same at the West India Docks, and to take the same from alongside at their expense, and to deliver the *same to the said A. B. Belcher, according to the bills of lading; yet the defendant refused to deliver, or to suffer or permit the master or any other person to deliver the cargo to the said A. B. Belcher, agreeably to the bills of lading, or to the plaintiffs, and have prevented their delivery, and detained them on board the vessel contrary to the meaning of the charter-party. The declaration then assigns as a second breach that the defendants would not suffer and permit the plaintiffs, as assignees, to use or enjoy the vessel according to the terms of the charter-party during its continuance, or during that time to possess the entire and exclusive use and disposal of the whole reach and burthen of the said vessel, with the exception stated in the charter-party, but that, after the bankruptcy of Stockdale, and after the ship's arrival in London, and before the discharge of the cargo, and during the continuance of the charter-party, they deprived the plaintiffs of the use and enjoyment of the ship and every part thereof, and the defendants themselves seized and took possession of the whole of the said ship, and excluded the plaintiffs therefrom, alleging, as special damage, the deterioration of the goods, and the loss of profits by the sale.

The defendants, by their sixth plea, allege that after the making the charter-party, and during the subsistence of its provisions, and after the bankruptcy of Stockdale, and after the arrival of the ship at London, and before her final discharge, a large sum of money was due to the defendants as owners of the ship, for the use of the

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ship, according to the terms of the charter-party, and for the freight and carriage and conveyance of the cargo and goods in the declaration mentioned, according to the terms and provisions of the charter-party; and a certain other sum of money was payable to the defendants on the final discharge of the ship, for the use of the said ship, and for freight and carriage of the *cargo; yet that the plaintiffs and R. Stockdale would not pay the amount, or any part thereof, and the same remains unpaid; and the plea then proceeds to justify the refusal to deliver the cargo, and the detention of the same on board the ship, and their refusal to permit the plaintiffs to remove the same, and the keeping possession of the whole ship so having such cargo on board as and for a lien for the moneys so respectively due and payable according to the terms and provisions of the charter-party.

To this plea the plaintiffs have demurred, and have assigned several causes of special demurrer, to which, as will afterwards appear, it is unnecessary to advert.

Upon this demurrer two questions were argued before us: first, whether, by the terms of the charter-party, the defendants had any lien upon the cargo in respect of the freight or debt due under the charter-party for the hire of the ship; secondly, whether the existence of any such lien would justify the defendants excluding the plaintiffs from the ship before her final discharge.

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It must be admitted that there is some contradiction in the authorities bearing upon the first point, viz., the right of lien in the owners of the ship, and that, in the later cases, the terms of actual demise have not been considered as affording so decisive a criterion of the intention of the contracting parties as was supposed to belong to them in the case of *Hutton v. Bragg* (1). But when the several cases are closely examined, it will be found that the apparent conflict of authorities in this instance, as in all other questions arising upon the construction of written instruments, arises more from the variety of terms employed by the parties themselves in framing their contracts than from the difference of opinion in the Judges who interpret them; for in each of the cases in *which the owner's lien has been supported notwithstanding the terms of express demise, other stipulations will be found, sufficient to rebut the inference that the owners meant to part with the possession of the ship. Thus, in *Mitchell v. Scaife* (2), *Birley v.*

(1) 17 R. R. 431 (7 Taunt. 14; (2) 16 R. R. 795 (4 Camp. 296).
2 Marsh. 339).

Gladstone (1), *Yates v. Railston* (2), and *Christie v. Lewis* (3) there were terms that showed that the payment of the hire was to be either precedent to, or concomitant with, the delivery of the goods; whereas, in *Small v. Moutes* (4), the lien of the owner was expressly reserved by the charter-party. In each case the whole contract must be taken together, and due effect given to the several clauses that counteract or qualify each other; and thus it often happens that the same expression will bear different meanings, and require a different interpretation, according to the context of the instrument in which they are found. In construing this charter-party, therefore, we have not relied implicitly upon the interpretation put by Judges in other cases on any particular expression also found in this contract; but we have collected the intention of the contracting parties from the whole scope of the instrument, having reference nevertheless to the several authorities cited at the Bar, as guides to our decision; and we are satisfied that, in this particular case, according to the terms of this particular charter-party, the possession of the vessel was given up by the owners to the charterer during the continuance of the contract; that the master was in possession of the cargo as agent for the charterer, and not as the servant of the owners; that personal credit was given to the charterer for the payment of the hire of the vessel; and that no lien, or right or stoppage of the goods, was intended to be reserved to the owners as a security for the payment of the contract price. And we come to this conclusion because we find words of demise large enough to transfer the possession, if such words are necessary. We find also the owners giving to the charterer the power of appointing his own master, and requiring him to be responsible for the conduct of the master so appointed, as he would be for the conduct of his own servant; and we find that, in fact, the master was so appointed by the charterer. We find, further, that the freight for the goods was to be paid according to the bills of lading to the master thus appointed by the charterer, for the charterer's use, without any stipulation for its application towards the payment of the agreed price for the hire of the vessel. And we further find that, according to the terms of the contract, the parties contemplated that every part of the cargo

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(1) 15 R. R. 465 (3 M. & S. 205).

5 Moore, 211).

(2) 19 R. R. 524 (8 Taunt. 293;
2 Moore, 294).

(4) 35 R. R. 618 (9 Bing. 574;
2 Moo. & S. 674).

(3) 23 R. R. 483 (2 Brod. & B. 410;

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would be delivered before the balance reserved would become payable; and on the other hand, we find nothing in the contract that indicates any intention to make the delivery of the cargo to depend upon the precedent or concomitant payment of any portion of the stipulated price.

We are therefore of opinion that neither the declaration alone, nor the declaration and sixth plea taken together, disclose any facts that would give the defendants the lien which they claim; and the plaintiffs, therefore, will have judgment on the demurrer to the sixth plea. On this ground it becomes unnecessary for us to say anything upon the minor point—of the exclusion of the plaintiffs from the whole of the vessel, or upon any of the special grounds of demurrer.

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The seventh plea is pleaded in effect to so much of the declaration as relates to the alleged breach in not suffering and permitting the delivery of the cargo, and in detaining the same on board the ship, and taking and detaining possession of the whole of the ship with the *cargo on board, and excluding the plaintiffs therefrom, and in justification in substance alleges, that although the cargo and goods were, by the bills of lading, made deliverable to A. B. Belcher or his assigns, he or they paying customary freight for the same, and although the freight amounted to a large sum, and although there was then due to the defendants, as owners of the ship, for the use of the said ship for freight and carriage, a large sum according to the terms of the charter-party, and although a further sum of money was payable to the defendants, as owners of the said ship, on her final discharge for the use of the said ship, and for freight and carriage and conveyance of the said cargo and goods, yet the said A. B. Belcher refused to pay the said sums of money, or any other sum, for freight for the said goods; whereupon the defendants refused to suffer the delivery of the said goods to A. B. Belcher or to the plaintiffs, and detained the same on board the said ship, and refused to suffer the plaintiffs to remove or unload the said cargo, and kept and detained the possession of their said ship, so having on board the said cargo; as they lawfully might, for the cause aforesaid.

To this plea the plaintiffs replied, that the freight so payable, according to the terms of the bill of lading by the said A. B. Belcher or his assigns, was payable to James M'Cormick as the master and agent of the plaintiffs as assignees of Stockdale, the freight being by the terms of the charter-party payable to the

affreighter of the said vessel, and the said freight not being payable to the defendants or to James M'Cormick as their agent in that behalf; that on the arrival of the ship the plaintiffs as assignees discharged the said A. B. Belcher from paying to M'Cormick, and M'Cormick from receiving the freight, and required M'Cormick to deliver the cargo without payment of such freight; and that the said James M'Cormick was then ready and willing to deliver, and but for the hindrance of the defendants, and their so seizing and taking and keeping possession of the ship and cargo, would have delivered, the cargo to the said A. B. Belcher, without the payment of the freight.

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To this replication the defendants rejoin, that James M'Cormick was put in by Robert Stockdale the charterer of the vessel of his own appointment, under and in pursuance of the privilege reserved by the charter-party, as the defendants' master of the said ship, and as their agent and servant in respect of the said ship; and that the said James M'Cormick became and was the agent of the plaintiffs as such assignees, in such manner, and to such extent as by the charter-party is alleged and not otherwise, and that the said James M'Cormick had no other possession, or control, or disposal of the said cargo than in the character of master of the defendants' vessel, so appointed as aforesaid; and the defendants further say, that although the freight was eventually payable to the affreighter, yet James M'Cormick as the defendants' master of the ship, and as their agent with the knowledge and consent of the plaintiffs signed the bills of lading mentioned in the seventh plea, and thereby, on behalf of the defendants, undertook and promised that the goods and merchandise in that plea mentioned should be delivered to the said A. B. Belcher or his assigns, he or they paying freight for the same as customary, to the defendants, and that at the time of the signing of the bills of lading, and thence hitherto a large sum was due and owing from Robert Stockdale to the defendants according to the terms of the charter-party; and that after the signing of the bills of lading according to the provisions of the charter-party, other large sums of money became due to the defendants in respect of the freight, before and on the arrival of the ship; and that the plaintiffs had notice that the two sums mentioned in the seventh plea, were, according to the terms of the charter-party, due and payable to the defendants, and were then unpaid, and were requested to pay the same; and that the plaintiffs and also A. B. Belcher were requested by the defendants to pay to them

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the freight as customary, according to the terms of the bills of lading, and that the defendants did not consent that the assignees should discharge A. B. Belcher from paying the freight; without this, that the said last-mentioned freight was not payable to the defendants.

To this rejoinder the plaintiffs have demurred, assigning several special grounds of demurrer. But as it is obvious from the pleadings, that the main question raised upon this demurrer has already been disposed of by our judgment on the demurrer to the sixth plea, and as we have already held that the master must be considered as having signed the bills of lading as agent for the charterer, and to be entitled as such agent, and not as the servant to the owners, to demand the freight upon those bills from consignees, and that the defendants had no lien upon the goods for the stipulated price for the hire of the ship, it will be unnecessary to say anything more upon this part of the case, than that the judgment upon this demurrer must also be entered for the plaintiffs.

The eighth and last plea is pleaded to so much of the declaration as relates to the alleged breach in refusing to deliver, or to suffer and permit the master to deliver, the cargo to A. B. Belcher or to the plaintiffs, and in retaining the cargo on board the ship and refusing to suffer the plaintiffs to remove or unload the said cargo. The defendants by this plea allege that before the bankruptcy of R. Stockdale, a large sum of money became due from him to the defendants according to the terms of the charter-party, to recover which the defendants commenced an action against R. Stockdale, and that before his bankruptcy it was agreed between R. Stockdale
[*546] *and the defendants, that the defendants should withdraw their action, and all proceedings at law against R. Stockdale, and that he should deliver to W. G. Colchester the bills of lading for the then homeward cargo, and should empower W. G. Colchester to receive the amount of the proceeds thereof, for the purpose of paying in the first place to the defendants any freight that might be due to them on the charter-party, and the balance to the account of R. Stockdale with W. G. Colchester; that in pursuance of the agreement the defendants withdrew their action and all proceedings at law against R. Stockdale, and that he empowered W. G. Colchester accordingly; that after the arrival of the vessel a large sum of money was due to the defendants on the charter-party for the freight: whereupon the defendants, owners of the ship as well in their own right, and also as agents of W. G. Colchester, and

with his consent, went on board of the ship and took possession of the homeward cargo for the purposes last aforesaid, and in such right and as such agents, and in pursuance of such agreement and authority, refused to deliver, or to suffer or permit the master to deliver, the cargo to A. B. Belcher or to the plaintiffs, and detained the same on board the ship, and refused to suffer the plaintiffs to remove or unload the same; as they lawfully might &c.

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To this plea the plaintiffs replied, that at the time of the making of the agreement therein mentioned, no part of the cargo was on board the vessel, nor any of the bills of lading in existence, nor had they at any time come into the possession of W. G. Colchester or of the defendants, or of R. Stockdale; and that the authority to receive the amount of the proceeds of the cargo was given by R. Stockdale to W. G. Colchester before the shipping of the cargo, or the existence of the bills of lading; and that also before the shipping of the cargo, or the existence of the bills of lading, and before W. G. Colchester *had any control over the cargo, and while R. Stockdale was the apparent and reputed owner thereof, and whilst the defendants' action against him was still pending, R. Stockdale became bankrupt, and the plaintiffs were appointed his assignees, whereby the authority given to W. G. Colchester by R. Stockdale, and the agreement made with the defendants became revoked of which the defendants had notice before any exercise of the authority given to W. G. Colchester. The plaintiffs in their replication further allege that the cargo was from the time of the shipping thereof till the seizure thereof by the defendants in the possession and control of the plaintiffs as assignees, and of James M'Cormick as their agent, and that the plaintiffs had not in any way confirmed or assented to the agreement in the last plea mentioned, or to the power or authority given by R. Stockdale to W. G. Colchester, but had altogether rejected the same.

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To this replication the defendants have rejoined, that before R. Stockdale's bankruptcy, and before any revocation by him of the agreement, or of the authority given by him, certain goods had been provided and shipped at Sierra Leone by R. Stockdale's agents, as part of the ship's homeward cargo, and on his account; and that these goods were afterwards carried in the ship to the river Gambia, where for the purpose of more conveniently loading the whole of the homeward cargo, they were landed before R. Stockdale's bankruptcy, and there remained ready for shipment. The defendants further allege, that other goods provided by R. Stock-

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dale's agents at the river Gambia were also before his bankruptcy ready for shipment on his account as a further portion of the homeward cargo; and that afterwards both sets of goods were shipped on board the vessel as the homeward cargo thereof; and thereupon the defendants, for the purposes, and by the authority in the last plea mentioned, *went on board and took possession of the homeward cargo of the ship, and refused to deliver or to permit and suffer the master to deliver the cargo to A. B. Belcher, or to the plaintiffs, and detained the same on board the ship, and refused to suffer the plaintiffs to remove or unload the same, as they lawfully might &c.

To this rejoinder the plaintiffs have demurred specially; but, in the view we take of the case, it becomes unnecessary to consider the special causes of demurrer assigned.

In considering the questions raised upon these pleadings, it must be remembered that the plaintiffs, as assignees, take the property of Stockdale, subject to all the incumbrances, equitable as well as legal, to which it would have been subject in the hands of Stockdale himself if he had continued solvent, except in those cases specially provided for by the Bankrupt Act. Two questions, therefore, will arise upon this demurrer: first, whether any lien, legal or equitable, vested in Colchester before the bankruptcy of Stockdale; and, secondly, whether such lien, if it existed, has been affected by the bankruptcy of Stockdale. It was not contended at the Bar that there had been any legal assignment of the goods to Colchester, but it was argued that the agreement stated in the eighth plea amounted to an equitable assignment to him, and that he had an equitable lien on the goods, to the extent of the freight due to the defendant on the charter-party; and the cases of *Brown v. Heathcote* (1), *Burn v. Carvalho* (2), and *Hutchinson v. Heyworth* (3), were cited as authorities for this point. According to these authorities, there can be no doubt that, if the goods had been on board the vessel, and the bills of lading *had been handed over to Colchester before the bankruptcy, though not indorsed to him till afterwards, he would have acquired a good equitable lien, not only as against Stockdale, but as against the assignees. And, according to the opinion of Lord HARDWICKE in *Brown v. Heathcote*, he would have acquired such lien as against Stockdale by virtue of the agreement

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(1) 1 Atk. 160.

(3) 48 R. R. 530 (9 Ad. & El. 373;

(2) 48 R. R. 213 (1 Ad. & El. 883; 1 P. & D. 266).

4 Nev. & M. 889).

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alone, without the delivery of any bill of lading. The cases of *Lempriere v. Pasley*, and *Falkener v. Case*, as cited by Mr. Justice ASHHURST in the former case, were decided against the assignees, on the ground that the bankrupt had done all that was in his power to complete the equitable assignment, and to deprive himself of the power of disposing of the property assigned. The case of *Burn v. Carralho* was decided in favour of the assignees, because the equitable assignment was not complete before the bankruptcy. In the case of *Hutchinson v. Heyworth*, the bankrupt had sent out directions to his agent abroad before his bankruptcy, to pay a portion of the proceeds of certain shipments to certain creditors there; and the money having been paid after the bankruptcy, and after notice from the assignees, the question was, whether the bankrupt's directions had been revoked by his bankruptcy; and the Court held, that as the agent had, before the bankruptcy of his principal, pledged himself to the creditor upon his guaranteeing him against the claims of other creditors, to pay over the money according to the principal's orders, there was either an appropriation of the funds to that extent, or an equitable assignment, before the bankruptcy, and that in neither case was there any revocation by the bankruptcy of the owner.

On the part of the plaintiffs it was contended, that neither of these cases was in point; that there was in this case no actual assignment of the goods, but only a contract to assign at some future time; that Colchester *never had possession either of the goods, or of any symbol representing the goods; and that the contract had been revoked by the bankruptcy of Stockdale before any cargo had been finally shipped on board the vessel; and, therefore, before the contract had attached to any definite goods, and while it was uncertain of what goods the cargo would be eventually composed.

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As to the first portion of the cargo, which had been brought on board the vessel from Sierra Leone to the river Gambia, and there unloaded for the temporary purpose of more conveniently loading the whole of the homeward cargo, we think that those goods are sufficiently alleged to have been in the possession of the charterers, at the date of the agreement, as part of the intended homeward cargo mentioned in the agreement, to bring them within the terms of that agreement, as equitably assigned to Colchester for the purposes mentioned in that agreement; and if the other part of the cargo had been with equal clearness described to have been in

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the possession of the charterers' agents, and to have been set apart, as well as destined, as part of the homeward cargo before and at the time of the agreement, we should have been inclined to hold that the agreement operated as an assignment in equity of those specific goods, and that those goods were sufficiently identified with the goods that form the subject of the present action. But there is so much obscurity in the language of the rejoinder as to that portion of the cargo that was provided at the river Gambia, that we find it impossible to say, with any degree of certainty, that the goods which were afterwards put on board the vessel and brought to England, were at any time before the bankruptcy set apart and definitely appropriated as part of the homeward cargo, so as to form the subject of any complete assignment before the bankruptcy of Stockdale.

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But this becomes of less importance, because we are *of opinion, that if enough had been shown to make out a valid equitable assignment as against Stockdale himself if he had remained solvent, still the property in all the goods passed to the plaintiffs, as goods in the order and disposition of the bankrupt at the time of his bankruptcy, under the seventy-second section of the statute 6 Geo. IV. c. 16 (1); and that, therefore, as against the assignees, Colchester could not set up any lien under the agreement stated in the plea. Before this agreement the bankrupt was the real owner of the goods, and according to the most favourable view of the statement in the rejoinder, was, through his agents, in actual possession of them. By the replication it is alleged, and not denied by the rejoinder, that neither Colchester nor the defendants ever had possession of the goods forming the intended cargo, but that Stockdale continued the apparent and reputed owner. By the assignment to Colchester, he became in equity the owner of the goods; and, according to the case of *Ryall v. Rolle* (2), and many subsequent cases, an equitable assignee is to be considered as the true owner of the goods assigned, within the meaning of the provisions in the bankrupt laws respecting reputed ownership. If, therefore, the goods forming the intended cargo were in the possession, order, and disposition of Stockdale at the time of his bankruptcy, with the consent of Colchester the true owner, the property in those goods would pass to the assignees. And as by the pleadings it is admitted, that the bankrupt was left in the sole possession

(1) See now Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 44 (iii)).—A. C.

(2) 1 Atk. 165.

and management of the cargo, with full power to dispose of, or gain credit upon, any part of it, having parted with no document that was essential to his power of disposal, we see no ground upon which we can hold these goods to be exempted from the operation of the seventy-second section of the Bankrupt Act (1).

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The judgment must therefore be entered for the plaintiffs upon this demurrer, as well as upon the former demurrers before considered.

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Judgment for the plaintiffs.

THE THAMES HAVEN DOCK AND RAILWAY COMPANY v. ROSE (2).

1842.
May 31.

(4 Man. & G. 552—560; S. C. 5 Scott, N. R. 524; 12 L. J. C. P. 90; 9 Dowl. N. S. 104; 3 Ry. Cas. 177.)

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By a private Act, the business of a Company thereby incorporated was to be carried on by twelve directors; five of whom were to be a quorum. There were provisions in the Act as to the election of new directors in case of death, &c. The directors were authorised to make calls, and in case of non-payment, the Company had power to sue.

An action having been brought for calls, the defendant in March suffered judgment by default. In Trinity Term following he applied to set aside the judgment, upon the ground that at the time the calls were made, there were only seven directors; and that he had only lately learnt that fact.

The Court refused the application, holding that the enactment as to the number of directors was only directory.

Also, *semble*, that the application was made too late.

BOMPAS, Serjt., on behalf of the defendant, moved for a rule calling upon the plaintiffs to show cause why the judgment, which had been signed in this cause, and all subsequent proceedings, should not be set aside for irregularity.

The Company was incorporated by a private Act, 6 & 7 Will. IV. c. cviii., by the name and style of the Thames Haven Dock and Railway Company (3). The *defendant was a proprietor in the

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(1) 6 Geo. IV. c. 16.

(2) Distinguished *Re Alma Spinning Co.*, *Bottomley's* case (1880) 16 Ch. D. 681, 50 L. J. Ch. 167; approved *York Tramways Co. v. Willows* (1880) 8 Q. B. D. 685, 697, 51 L. J. Q. B. 257; and see *Owen and Ashworth's Claim* [1901] 1 Ch. 115, 70 L. J. Ch. 82, C. A.—A. C.

(3) The following sections of this Act were referred to in the argument:

Sect. 108 enacts, that the business and concerns of the Company shall be

carried on under the management of twelve directors, to be chosen from time to time from amongst the proprietors for the time being of the Company, qualified by holding ten shares or upwards each; and that such directors shall have the general management, direction, superintendence, and control of the business and concerns of the Company, and the custody of the common seal of the Company, with power to use the same on their behalf, and also the custody

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Company, and the action was brought against him in respect of calls. He *had suffered judgment by default on the 10th of March

of the books of account, *and other books, deeds, and papers, and shall have power to direct the investment, calling in and laying out, sale and disposal of the stock, effects, funds, moneys, and securities of the Company, and all other the dealings of the Company, and to call and appoint the times and places of holding general and other meetings of the proprietors, and to superintend, direct, and control the correspondence and mode of keeping the accounts, and the ascertainment of dividends, and the profits on shares, and to do all other things necessary, or to be deemed by them proper or expedient, for carrying on the business and concerns of the Company, and to enforce, perform, and execute, all the powers, authorities, privileges, acts, and things in relation to the Company, and to bind the Company, as if the same were done by the whole corporation, except such as are hereby required to be done at some general or special meeting of the Company; and the directors for the time being shall have power to frame rules and regulations, and prescribe the orders and directions for carrying on the business and concerns of the Company, and alter and vary the same from time to time as they in their discretion shall think fit; and all such rules and regulations shall have the force of bye-laws, provided the same be not repugnant to any of the provisions of the Act, nor to any bye-law which may have been duly passed at any general or special meeting of the proprietors of the Company; and no individual proprietor, not being a director (except as hereinafter provided), shall have a right to any interference, management, direction, or control in or over the business and concerns of the Company, or the capital, stock, or effects thereof. [Cf. Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), s. 90.]

Sect. 109 enacts that nine individuals, therein named, shall be the first directors of the Company, and that they

shall, unless they or any of them shall sooner die, resign, or become disqualified, as thereafter mentioned, continue in office until the first general meeting of the Company to be held after the passing of the Act; that at such meeting, all the directors shall go out of office, and twelve directors shall be elected in their place and stead, who shall continue in office until the first half-yearly meeting of the Company in the year 1838; that at such half-yearly meeting in 1838, three of the directors who shall have been so elected as aforesaid (to be determined by ballot amongst themselves) shall go out of office; that at each first half-yearly general meeting in the three following years, three of the directors who shall have been so elected as aforesaid (to be determined by ballot amongst themselves) shall go *out of office, and at each half-yearly general meeting in every subsequent year the three directors who shall have been longest in office since their last election, shall go out of office; and at every general half-yearly meeting at which three directors are to go out of office as aforesaid, three new directors shall be elected. [Cf. Companies Clauses Act, 1845, ss. 83, 88.]

Sect. 110 provides and enacts, that any director who shall, by ballot or rotation, go out of office, may be immediately or at any future time re-elected by the Company as a director, and that after such re-election he shall, with reference to the going out in rotation, be considered as a new director. [Cf. Companies Clauses Act, 1845, s. 88.]

Sect. 111 provides and enacts, that no person holding any office, &c., or being concerned or interested in any contract, under the Company, shall be capable of being chosen, or of continuing, a director, nor shall any director be capable of accepting any office, place, or employment, or of taking, or being concerned, or interested in any contract under the Company; and

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last; but the affidavit on which the motion was made, *stated that it had only lately come to his knowledge, that there were only

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that in either of the said cases, the party so offending shall forfeit the sum of 50*l.* during the time he shall be a director; and that if any director shall, at any time subsequent to his election, accept or continue to hold any other office or place of trust or profit under the Company, or shall either directly or indirectly be concerned in any contract with the Company, or shall participate in any manner in any work to be done for the Company, or shall at any time cease to be a proprietor of ten shares at least in the undertaking, the office of such director shall thereupon become vacant, and he shall thenceforth be disqualified from voting or acting at any succeeding meeting of directors: provided nevertheless, that until the disqualification of any director shall have been communicated to, and recorded by, a court of directors, every act and proceeding to which such disqualified director shall have been a party, shall be as binding and effectual as if no such disqualification had taken place: provided also, that it shall be lawful for any general meeting to exempt any particular person from the operation of this present clause, in case they shall deem it advantageous so to do. [Cf. Companies Clauses Act, 1845, s. 85.]

Sect. 112 enacts, that when any director elected by virtue of the Act, shall die or resign or become disqualified or incompetent to act as a director, or shall cease to be a director by any other means than by going out of office, it shall be lawful for the remaining directors to elect some other proprietor duly qualified to be a director; and that every such proprietor so elected to fill up any such vacancy, shall continue in office so long only as the person in whose place or stead he may be elected would have been entitled to continue in office had he lived and remained in office. [Cf. Companies Clauses Act, 1845, s. 89.]

Sect. 116 enacts, that the directors

for the time being shall meet together at the office of the Company once at least in every two calendar months, and at such other times as they shall think proper, and at such other times as they shall be convened as therein-after mentioned; and each of such meetings shall be styled a court of directors; but that no meeting shall be deemed a Court competent to enter and determine upon business unless at least five directors shall be present at the commencement of the business, and when a decision takes place upon the whole or any part of the business; and if, on the day appointed for such meeting, a sufficient number of directors to constitute a Court shall not attend, then and in every such case the meeting shall be adjourned to the next or some subsequent day by the directors then present, but if none be present, then by the secretary of the said Company, or such other person as shall attend in his place; and that any director shall be at liberty to call an extraordinary meeting of directors, upon such notice and in such manner, and to consist of at least such number (not being less than five), as shall from time to time be provided by the bye-laws of the Company, or the orders of the court of directors, &c. [Cf. Companies Clauses Act, 1845, s. 92.]

Sect. 118 enacts, that the directors shall have full power from time to time to make such calls of money from the several subscribers to, and proprietors for the time being of, the undertaking, not exceeding in the whole, including the sums already paid in respect of such share, the sum of 150*l.* for each share, as they shall from time to time find necessary for the purposes of the undertaking; so that no call shall exceed the sum of 5*l.* upon each share in the undertaking, and so that the total amount of such calls in any one year shall not exceed 20*l.* upon each share, and that there shall be an interval of three calendar months at least between every two

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seven directors of the Company at the time the calls in question were made.

The learned Serjeant contended that, as by the 108th section (1), all the business and concerns of the Company were to be carried on by twelve directors, and that as there were only seven at the time the calls were made, in respect of which the action was brought, there were no proper parties to maintain the action.

(MAULE, J.: The 112th section (2) says, that when any of the twelve directors shall die, &c., "it shall be lawful for the remaining directors to elect some other proprietor, &c., to be a director." [*557] It does not say it shall be necessary to do *so.

successive calls; and that such several sums of money so to be called for shall be paid into such bank or banks, or to such person or persons and at such time and place and in such a manner, as the directors shall from time to time order and appoint, and that of such time and place twenty-one days notice at the least shall be previously given by advertisement, under the hand of the secretary for the time being, inserted in two or more London newspapers, and in one or more newspaper or newspapers usually circulating in the county of Essex. [Cf. Companies Clauses Act, 1845, ss. 22, 90.]

Sect. 119 enacts, that the court of directors for the time being shall have full power and authority to use the common seal on behalf of the Company; and that all contracts in writing relating *to the affairs of the Company, which shall be signed by any three of the directors in pursuance of a resolution of a court of directors, shall be binding on the Company and all other parties thereto, their respective successors, heirs, &c. and actions and suits may be maintained thereon, and damages and costs recovered by or against the Company or any other parties thereto, failing in the execution thereof. [Cf. Companies Clauses Act, 1845, s. 97.]

Sect. 123 enacts, that the several parties who have subscribed, or who shall hereafter subscribe, for or towards the undertaking, and every proprietor

of any share in the undertaking, shall pay the respective sums of money by them respectively subscribed for, or such parts or proportions thereof as shall from time to time be called for by the directors, by virtue of and pursuant to the powers and authorities of the Act, to such persons and at such times and places as the directors shall from time to time, in manner therein-before mentioned, direct and appoint; and that if any proprietor of any such shares shall refuse or neglect to pay his rateable proportion of the money, so to be called for at such time and in such manner as aforesaid, then and in such case, and so often as the same shall happen, such proprietor shall pay interest for the same after the rate of five pounds per centum per annum. from the day appointed for payment thereof up to the time when the same shall be actually paid; and that if any proprietor of any such share shall neglect or refuse to pay such his rateable proportion, together with interest (if any) accruing for the same, for the space of one calendar month next after the day appointed for the payment thereof, then it shall be lawful for the Company to sue for and recover the same, with full costs of suit, in any of His Majesty's Courts of record, by action of debt or on the case, or by bill, &c. [Cf. Companies Clauses Act, 1845, ss. 23, 25.]

(1) *Supra*, 599.

(2) *Supra*, 601.

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CRESSWELL, J.: Is there anything in the Act that requires the action to be brought by twelve directors?)

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Not in express terms; but it is submitted, that as twelve directors are required to transact the business of the Company, when there are not so many, there is in fact no Company. The expression, that "it shall be lawful" for them to proceed to an election in cases of a vacancy, must be construed in an imperative sense (1). The 116th section (2) provides that five directors may act as a quorum, but the five must be part of the twelve.

(MAULE, J.: The other directors may have died or become disqualified.)

Then the remaining directors are bound to proceed to a new election.

(TINDAL, Ch. J.: There must be some interval between the death of a director and a re-election.

MAULE, J.: Or there may not remain twelve shareholders with ten shares each, which is the qualification requisite to become a director.)

In that case the corporation would be at an end.

(MAULE, J.: There might be ground for applying for a *mandamus* in the present state of the Company, to order them to proceed to a new election; but it would be going a great way to set aside the proceedings in an action.)

Suppose there were only one director left, it could not be said that the Company was then properly constituted so as to sue other parties. And the same principle will apply to the present state of facts.

(COLTMAN, J.: There does not appear to be any irregularity on the face of the proceedings?)

There does not; but they would appear equally regular if the action were brought by a stranger in the name of the Company. In such a case the Court would set aside the proceedings, on the ground that the action had been brought without authority.

(1) *Vide* 1 Wms. Saund. 58, n. (1).

(2) *Supra*, 601.

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(MAULE, J.: There might be some ground for that argument if the application were made on the *part of the Company; but here, they appear to approve of the action. They might, if they had thought proper, have called a meeting and instructed counsel to state that the action was brought without their authority.)

It is submitted that it is equally open to the defendant to rely upon that point, as there are no parties in existence legally competent to authorise the action. The present application has been made at the earliest possible period, as it appears from the affidavit that it was only during the present week that the defendant discovered there were only seven directors when the calls were made upon which the action is brought.

(MAULE, J.: It may be, that only seven attended at the meeting.

TINDAL, Ch. J.: Or the number may have been filled up before the action was brought; and the twelve directors may have adopted the acts of the seven.

CRESSWELL, J.: The 123rd section (1) says, that "it shall be lawful for the Company to sue.")

But the Company have no power to act unless there are the proper number of directors.

(COLTMAN, J.: If the defendant had paid these calls, could he have been required to pay them again?)

It is submitted, that if fresh calls had been made by a meeting of twelve directors, he would have been liable to pay those calls. In order to constitute a proper meeting, it is necessary to summon twelve directors; five of whom may act. But, in the present case, there can have been a summons of seven only; and five of that number have no power either to make calls, or to authorise the action being brought.

TINDAL, Ch. J.:

This is confessedly a case of the first impression, no precedent having been shown for a similar application.

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The first observation that occurs is, that this is a *very late

period for making the application. The judgment was signed in March, and the defendant at that time had all the means of knowledge which he now possesses, so far as they are derived from the Act of Parliament, and an inspection of the books of the Company; but he does not make this application till nearly the middle of Trinity Term, when the consequence of acceding to it would be, that the proceedings would stand over till after the long vacation.

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But, independently of this, I think there is no ground for the present application. The action is brought by the Company for a debt, admitted by the defendant to be due, as he has allowed judgment to go by default. The Act says that the Company may sue; and they have sued in this instance. It is, however, contended, that upon this power to sue must be ingrafted, what is said in another part of the Act—that the business and concerns of the Company shall be carried on under the management of twelve directors; but that I think is matter of direction only. If any party is dissatisfied with the proceedings of the Company because there is not the full number of directors, he may apply for a *mandamus* to have the number completed. If the fact of the number not being completed is an answer to an action for calls, it is pleadable as such, and ought to have been pleaded in this instance; but a defendant cannot apply to the equitable jurisdiction or the discretion of the Court, to set aside a judgment upon grounds which might have been pleaded as an answer to the action.

It appears to me, that the proper parties to the record being before us, and the debt being admitted, the Court ought not—especially at this period of time—to interfere in the matter.

COLTMAN, J. :

This is an application to the summary jurisdiction of the Court, which ought not to be acceded *to, unless for the purpose of [*560]
furthering justice. It has not been shown that, if the money were paid in this action, it could be recovered again from the defendant: and it appears to me that it could not. I agree, therefore, that there ought to be no rule.

MAULE, J. :

I am of the same opinion. I do not think that, according to the Act of Parliament, it is necessary that there should be always

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twelve directors of the Company. The question depends upon sects. 109, 110, 111 and 112(1). (The learned Judge read those sections.)

By sect. 112, in the case of death or disqualification of any of the directors, a power is given to the remaining directors to elect others, but it is not compulsory on them to do so. If they are of opinion that the number of directors is not sufficient to enable them to carry on the affairs of the Company, they may elect others. At present there are only seven directors; but it may be, that seven are a sufficient number for the purposes of the Company. It appears to me that the provision referred to is a mere arrangement as to the internal affairs of the Company, and that it does not apply to their external affairs, or prevent them from enforcing calls that have been duly made.

CRESSWELL, J. concurred.

Rule refused.

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WETHERED v. CALCUTT.

(4 Man. & G. 566—573; S. C. 5 Scott, N. R. 409; 11 L. J. M. C. 123;
6 Jur. 487.)

In an action against B., an overseer, for a penalty alleged to have been incurred under the Poor Rate Act, 1743 (17 Geo. II. c. 3), for not delivering a copy of the poor-rate to A., an inhabitant, it appeared that A. was a churchwarden of the parish: Held, that A. was not entitled to a copy.

DEBT, on the 17 Geo. II. c. 3. The first count of the declaration alleged that the plaintiff was an inhabitant of the parish of Little Marlow, and the defendant one of the overseers of the poor of the said parish; that on the 17th of May, 1841, the churchwardens and overseers of the said parish made a certain rate for the relief of the poor, which said rate was duly allowed; that afterwards, to wit, on the Sunday next after the allowance of the said rate, to wit on the 23rd of May in the year aforesaid, the said churchwardens and overseers of Little Marlow aforesaid, did reduce a certain notice of the said rate having been allowed as aforesaid, into writing, and did, previously to the commencement of divine service in the parish church of Little Marlow aforesaid, on the day and year last aforesaid (the said last-mentioned day being the Sunday next, after the allowance of the said rate as aforesaid), affix copies in writing of the said notice on the doors of all the churches and chapels within the parish of Little Marlow aforesaid;

(1) *Supra*, pp. 600, 601.

and that public notice of the said rate having been so allowed as aforesaid, was then duly given, according to the form of the statute in that case made and provided. The count then alleged a demand to inspect the rate, and a refusal by the defendant, &c.

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Second count, that the plaintiff being such inhabitant, and the defendant being such overseer of the poor of the said parish, and the said rate being so made, assessed, allowed, published, and notified as in that behalf aforesaid, he the plaintiff afterwards, at a reasonable and seasonable time in that behalf, to wit on the 11th of October in the year aforesaid, demanded of the defendant *so then being such overseer of the poor of the parish as aforesaid, a copy of the said rate so made, allowed, assessed, published, and notified as aforesaid, and was then to wit, upon and at the time of the making of the said demand, ready to pay and offered to pay to the defendant for the same at and after the rate of 6d., for every twenty-four names thereof, and in the said rate, according to the form of the statute in that case made and provided; yet the defendant did not, nor would then, nor had he at any time since delivered or given to the plaintiff a copy of the said rate, or any part thereof, &c.

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The defendant pleaded, Not guilty "by statute."

At the trial before *Atcherley*, Serjt. at the last Spring Assizes at Aylesbury, it appeared that the plaintiff, who was one of the churchwardens of the parish of Little Marlow, had, on the 11th of October, 1841, called upon the defendant, one of the overseers of the same parish, and had demanded to inspect the rate in question, and also a copy thereof, at the same time tendering 10s. for such copy. The defendant informed him that the rate-book was in the possession of one Phillips, an assistant overseer, but said that he would send for it, and would let the plaintiff have a copy on the Thursday following. On the same day Phillips, by the direction of the defendant, carried the rate-book to a person of the name of Ward, in order to have a copy made of the rate. On the 25th of November the plaintiff's attorney wrote to the defendant, threatening to proceed against him under the statute of the 17 Geo. II. c. 8. On the 27th of November the attorney for the defendant replied, stating, among other things, that "the copy of the rate required by Mr. Wethered was made upwards of a month ago; which he has been informed of. It has been, and now is, ready for delivery by me, on payment of 20s., my charge, and, now, the further charge of 5s."

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It was admitted that the rate had been duly made *and allowed, but the only evidence of publication was, that a paper which purported to be a notice of the making and allowance of the rate, was produced by Phillips the assistant-overseer, and after being read in the church, was taken away by the defendant. The rate had been collected, and had been paid, among others, by the defendant.

For the defendant, it was contended; first, that there was no evidence of the publication of the rate; secondly, that the plaintiff being himself a churchwarden, was not within the 17 Geo. II. c. 3; thirdly, that the defendant was not liable to the penalties imposed by the Act, there having been no wilful refusal or neglect on his part to produce the rate, &c.; and, fourthly, that the demand to inspect the rate, &c., should have been made on Phillips the assistant-overseer, and not upon the defendant: *Bennett v. Edwards* (1); where it was held that an assistant-overseer, appointed under the 59 Geo. III. c. 12, having, by virtue of his office, the poor rate in his custody, is liable to a penalty under the 17 Geo. II. c. 3, for refusing to produce it to an inhabitant when lawfully demanded.

The learned Judge having directed a verdict for the plaintiff, for the amount of the penalties, with leave for the defendant to move to enter a nonsuit, if the Court should be of opinion that any of the objections taken were valid,

Storks, Serjt., in Easter Term last, obtained a rule nisi accordingly.

Channell, Serjt. (with whom was *Gunning*), now showed cause (2):

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It is submitted that there is nothing *in the statute of 17 Geo. II. c. 3, to limit the right thereby given, of enforcing the production, or the delivery of a copy, of the rate, in the manner that has been suggested. By section 2, churchwardens and overseers are to permit "all and every the inhabitants" of the parish, to inspect the rate at seasonable times, and, on demand, to furnish copies to "any inhabitant." By the third section, in case any churchwarden or overseer shall not permit "any inhabitant or parishioner" to inspect the said rates, &c., he shall forfeit the penalties therein mentioned; which are to be paid to the party aggrieved. The

(1) 8 B. & C. 702, affirmed in the Exchequer Chamber, *Edwards v. Bennett*, 31 R. R. 403 (6 Bing. 230; 3 Y. & J. 458; 3 Moo. & P. 749).

(2) As the judgment of the Court proceeded solely upon the second point, the argument on the other objections is omitted.

plaintiff is not the less an inhabitant parishioner, because he is a churchwarden. Supposing one of the overseers to take possession of the rate, and to refuse to produce it to the other parish officers, there seems no reason why they should not have the protection of the statute. It would be hard, if because a party is either a churchwarden or an overseer, he should be deprived of the benefit of the Act, and be compelled to bring an action (1) to recover possession of the rate. It may be much more important to a churchwarden than to another inhabitant of the parish, to see the rate. A churchwarden or an overseer who does not sign a rate, may clearly appeal against it; and being within the words of the statute, the Court will not exclude him from its provisions, if a case can be conceived in which he may be a party aggrieved by a non-compliance therewith.

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Storks, Serjt., contra :

As no authority is to be found on this point, the Court will look at the Act, to see if the plaintiff comes within it. The preamble shows that the inconveniences meant to be remedied were caused by the parties who made the rate withholding it from the rest of the parish. The churchwardens and *overseers are by the statute clearly put in contradistinction to the other inhabitants; for the second section evidently contemplates the case of the former being called to produce or furnish a copy of the rate to third parties. It cannot be supposed that the remedy given by the Act was meant to apply to churchwardens or overseers, who must be presumed to have the possession of those rates, the production of which the statute was passed to enforce.

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TINDAL, Ch. J. :

This is an action under the 17 Geo. II. c. 3, for penalties alleged to have been incurred by the defendant as one of the overseers of the parish of Little Marlow, in the county of Buckingham, for refusing to allow the plaintiff, a rated inhabitant of the parish, to inspect a rate made for the relief of the poor, and also for refusing him a copy of such rate. So far as the first count is concerned, it was not made out by the evidence, there having been no refusal to allow the plaintiff to inspect the rate. There was, however, some evidence to support the second count; and the question is, whether, on the facts proved, the case is brought within the statute. It

(1) *Quære, et vide post*, 612, note (1).

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seems to me that the Act was passed to give the inhabitants a remedy against the officers of the parish, and that the word "inhabitants" is used in contradistinction to "churchwardens and overseers." If the churchwardens and overseers of this parish had done their duty, the whole of them, including the plaintiff, would have been present when the rate was made; and the Legislature could never suppose that officers, whose duty it is to be so present, assisting in making the rate, could require the aid of the Act, in order to inspect it or to obtain a copy. It appears to me, therefore, that the plaintiff has not brought himself within the Act. It has been argued, that what took place when the defendant desired the assistant-overseer to furnish the plaintiff with a copy of the rate, was an admission *on his part that he was liable to do so; but I do not think that his voluntary promise placed the defendant in a worse position than that in which he stood before.

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COLTMAN, J. :

I also am of opinion that this case is not within the statute. It seems to me that it would have been a good answer to give to the plaintiff's demand of a copy of the rate, "You are a churchwarden—make a copy for yourself." The Act does not apply to a case like the present; for no inconvenience could ever be contemplated as likely to arise from the churchwardens and overseers themselves not possessing a power over their own rate (1). The object of the statute clearly was, to give a remedy to the inhabitants against "the unlimited power" of the parish officers to make rates, and by which they were liable to be oppressed. Therefore, when the Acts speak of "inhabitants" and "parishioners," those words must be understood as being used in contradistinction to "churchwardens and overseers;" for a penal statute is not to be extended beyond its fair and necessary construction.

MAULE, J. :

I also think that the rule must be made absolute. The statute, after reciting "great inconveniences do often arise in cities, &c. by reason of the unlimited power of the churchwardens and overseers of the poor, who frequently, on frivolous pretences, and for private ends, make unjust and illegal rates, in a secret and clandestine manner, contrary to the intent and meaning of the stat. 43 Eliz. c. 2," directs (s. 1) that public notice shall be given in the

(1) *Vide tamen, post, 612, note (1).*

church of every rate for the relief of the poor, the next Sunday after it shall be allowed. By the second section it is provided, that the churchwardens and overseers of the poor, or other persons authorised as aforesaid, in every parish, township, *or place, shall permit all and every the inhabitants of the said parish, township, or place to inspect every such rate at all seasonable times, paying 1s. for the same, and shall upon demand forthwith give copies of the same or any part thereof, to any inhabitant of the said parish, township, or place, paying at the rate of 6d. for every twenty-four names. The third section enacts, "that if any churchwarden or overseer of the poor or other person authorised as aforesaid, shall not permit any inhabitant or parishioner to inspect the said rates, or shall refuse or neglect to give copies thereof as aforesaid, such churchwarden or overseer, or other person authorised as aforesaid, for every such offence shall forfeit and pay to the party aggrieved the sum of 20l., to be sued for and recovered by action of debt," &c. It is contended on the part of the plaintiff that churchwardens are comprehended in the expression, "any inhabitant or parishioner;" but it appears to me, that the generality of those terms must be limited by the intention and object of the Act. Previously to the statute an obvious wrong might be suffered by the inhabitants of a parish, in having secret rates imposed upon them; and the Act meant to give a copy to those persons, who, without its aid, could not obtain such copy. It is not without precedent to construe a statute by what is presumed to have been its intention, notwithstanding you thereby limit its effect. By the seventeenth section of the Statute of Frauds, 29 Car. II. c. 3, it is provided that, in order to charge a party upon a contract for the sale of goods, there shall be some note or memorandum in writing of the bargain, made and signed by the parties to be charged by it or their agents thereunto lawfully authorised. Construing that clause literally, it would include the case of one of the parties signing as the agent of the other; but it was held, in *Farebrother v. Simmons* (1), that the agent *contemplated by that section who is to bind a defendant by his signature, must be a third person, and not the other contracting party.

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CRESSWELL, J.:

The three sections of the statute were framed in order to provide a remedy for the inconveniences recited in the preamble. The

(1) 24 B. R. 399 (5 B. & Ald. 333).

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first section directs that the churchwardens and overseers shall publish every rate when made, in the manner thereby prescribed; the second that they shall permit all inhabitants to inspect the rates at seasonable times, and, on demand, give copies thereof at a certain price; and the third section provides that if any churchwarden or overseer shall not permit any inhabitant or parishioner to inspect the rates, or shall refuse or neglect to give copies thereof, he shall forfeit and pay to the party aggrieved a certain sum, to be recovered as therein mentioned. It is quite clear that the relief provided in these clauses is for the same class of persons. The churchwardens and overseers are all presumed to be cognisant of the rate, and are entitled to the possession of it; consequently they have a higher right than the one given by the Act—to a mere inspection, or a copy of the rate. It cannot therefore be supposed that the statute was meant to apply to them.

Rule absolute (1).

1842.
June 4.

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DIRKS v. RICHARDS.

(4 Man. & G. 574—579; S. C. 5 Scott, N. B. 534; 6 Jur. 562; Car. & M. 626.)

A picture was placed by A. in the hands of B. for sale. B. deposited it with C. On its being demanded by A., C. claimed 5s. for warehouse-room; but on a second demand being made, with an offer to pay any claim which C. might have for warehouse-room, C. refused to give up the picture without being paid 8l. due to him from B.

Held, that the demand of the 8l. amounted to a waiver of the claim for warehouse-room, and that it rendered a specific tender in respect thereof unnecessary.

DETINUE, for a picture. Pleas: *Non detinet*, and not possessed; upon both of which issue was joined.

At the trial before Alderson, B., at the last Assizes for the county of Surrey, it appeared that the picture had been placed in the hands of a person named Bye for sale. Bye deposited it with

(1) An action lies by one joint-tenant, or one tenant in common of a chattel against another for destroying the joint or common chattel, but not for withholding or concealing it. The churchwardens and overseers cannot have actual joint possession of the rate except when all are together; and it would appear that one who was *in malo lecti* or *in itinere* when the rate was made, or who, though he may have once seen it, finds his memory too infirm to retain the particulars of

every assessment, can get it from the unaccommodating holder, or even obtain a sight of it, only by force or by stratagem. "If the one take the whole to himself out of the possession of the other, the other has no remedy in order to occupy in common, but to take it from him who has done to him the wrong, when he can see his time. (*quand il voit son temps*)." Littleton. sect. 323, Of Tenants in Common. And see 2 Wms. Saund. 47 h.

the defendant, an auctioneer, at the same time telling him that his charge for warehouse-rent must be moderate. The plaintiff subsequently demanded the picture, whereupon the defendant made a claim of 5*s.* for warehouse-room. The plaintiff having made a second demand in writing, accompanied with an offer to pay the defendant any lien he might have on the picture for warehouse-room, the latter stated that he would not deliver it up until he was paid a debt of 8*l.* due to him from Bye. No tender was made of any specific sum for warehouse-room. *Scarfe v. Morgan* (1) was cited on behalf of the defendant.

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The learned Judge directed the jury, if they were satisfied that the picture was the plaintiff's, and that it was detained by the defendant, to find for the plaintiff, telling them that by the demand of 8*l.*, the defendant waived or dispensed with any tender for warehouse-room. The jury having found for the plaintiff,

Sir T. Wilde, Serjt., in Easter Term last, obtained a rule *nisi* for a new trial, on the ground of misdirection, *contending that a tender of a specific sum for warehouse-rent should have been made.

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Shee, Serjt., now showed cause :

The plaintiff having offered to pay what might be due for warehouse-room, the defendant's demand of 8*l.* for the debt due to him from Bye, was clearly a waiver of his claim for warehouse-rent. It rendered the detainer unjustifiable, and dispensed with the necessity of making any tender of such rent. * * *

Channell, Serjt. (with whom was *Montague Chambers*), in support of the rule :

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The question is, whether the claim of 8*l.*, which it is conceded the defendant had no right to make, dispensed with the necessity of a tender of what was really due to him for warehouse-rent.

* * The present case is not to be distinguished from *Scarfe v. Morgan*. There, the plaintiff sent a mare to the defendant, who was a farmer, to be covered by a stallion belonging to him. The mare was taken to the defendant's stables, and covered accordingly, upon a Sunday. The charge for covering not being paid, the defendant detained the mare. A demand of her was afterwards made, but he refused to deliver her, claiming a lien, not only for

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the charge on that occasion, but for a general balance due *to him on another account. It was held that the defendant was entitled to a specific lien on the mare for the charge for covering her; and that the claim made by him to retain her for the general balance was not a waiver of his lien for the charge on the particular occasion, and did not dispense with the necessity of a tender of that sum. ALDERSON, B. there said, "It seems to me a monstrous proposition to say, that a party who claims in respect of two sums to detain a mare, is supposed to have waived his right to detain her as to one (1). The more natural conclusion is, that the defendant intended to act upon both; if so, and if the other party is informed of that, it then became his duty to consider whether he would tender one or the other."

MAULE, J.:

Did not the claim of the 8*l.* by the defendant amount to this? "I do not recognise your right to the picture; I claim a lien on it for 8*l.* due to me from Bye, who deposited it with me." If the defendant set up an inconsistent claim, it was clearly a waiver of his claim for warehouse-rent.

The rest of the Court concurred.

Rule discharged.

1842.
Jan. 13.
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CRANE v. PRICE AND OTHERS(2).

(4 Man. & G. 580—609; S. C. 5 Scott, N. R. 338; 12 L. J. C. P. 81.)

It is no objection to the validity of a patent that the invention cannot be used except by means of a former patented invention; especially where the second patentee expressly disclaims any part of such former invention.

In 1829 A. obtained a patent for the use of hot-air blast in furnaces. In

(1) Without supposing the party to waive his right to detain in respect of the specific lien, the assumption of the right to withhold the possession of the mare from the owner, until performance of a condition which the person detaining had no right to impose, would appear to be a tortious conversion on the part of such person, notwithstanding any other title to detain remaining in him.

In *Scurfe v. Morgan*, though there may have been a waiver, (i.e., a dispensation with the necessity,) of a tender, there could have been no inten-

tion to waive or abandon the right to detain for the particular charge, there having been an express demand of both sums. In the principal case no mention appears to have been made of the 5*s.* when the 8*l.* was demanded. It would, however, be, perhaps, too much to infer from that omission, that the defendant really meant to give up his claim for warehouse-rent.

(2) Questioned, *Rushton v. Crawley* (1870) L. R. 10 Eq. 522, 529; *Murray v. Clayton* (1872) L. R. 7 Ch. 570, 584: cited *Clark v. Adie* (1877) 2 App. Cas. 315, 335, 46 L. J. Ch. 385.—A. C.

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1837 B. took out a patent for "an improvement in the manufacture of iron," which consisted in "the application of anthracite or stone-coal, combined with a hot-air blast in the smelting of iron." The hot-air blast was used by B. under a licence from A. The use of it with anthracite was new; and the iron produced in consequence was greater in yield, cheaper in cost, and better in quality than that produced by the ordinary method. Held, that the combination was a "new manufacture" within the 21 Jac. I. c. 3.

In the specification of A.'s invention, it was alleged that the blast was to be passed through a vessel, (the form of which vessel was stated to be immaterial,) by means of a tube, into the furnace. B., in the application of the hot-air blast, used a succession of tubes. Held, that this was not a material variation from the subject of A.'s patent.

CASE, for the infringement of a patent for an improvement in the manufacture of iron.

The declaration, after alleging that the plaintiff, before and at the time, &c., was the true and first inventor of an improvement in the manufacture of iron, set out certain letters patent, bearing date the 28th of September, 7 Will. IV. (1836), granting, in the usual manner, to the plaintiff, his executors, administrators, and assigns, the sole privilege to make, use, exercise, and vend the said invention for fourteen years; with the customary proviso as to the inrolment of the specification. The declaration then stated that, on the 27th of March, 1837, the requisite specification was made, and on the 28th of March was duly inrolled in the Court of Chancery. The breaches assigned were: first, that the defendants smelted, manufactured, and made iron on the said improved plan or principle, and in imitation of the said invention of the plaintiff, and according to the said improvement in the said letters patent mentioned, and sold and vended iron so smelted, &c.; secondly, that the defendants used and put in practice the said invention, by smelting, manufacturing, and working iron in imitation *of the said invention; thirdly, that the defendants did counterfeit, imitate, and resemble the said invention, and did make colourable additions thereto and subtractions therefrom, whereby to pretend themselves the inventors thereof; fourthly, that the defendants smelted and manufactured and made iron with certain improvements in the process of such smelting, and which were intended to imitate and resemble, and did imitate and resemble, the said improvement so invented by the plaintiff, and thereby counterfeited the same.

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Pleas: first, Not guilty.

Secondly, that the plaintiff was not the true and first inventor of the said alleged improvement.

The third plea set out the specification, as follows:

"To all to whom these presents shall come, I, George Crane, of,

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&c., iron-master, send greeting:" (the specification then briefly recited the letters patent and the proviso as to the specification). "Now, know ye, that in compliance with the said proviso, I, the said G. C., do hereby declare the nature of my invention, and the manner in which the same is to be performed, are fully described and ascertained in and by the following statement thereof, that is to say; according to the ordinary practice of obtaining iron from iron-stone, mine or ore in this country, the iron-stone, mine or ore, either calcined or in the raw state, according to the respective qualities, is put into suitable furnaces with coke produced from bituminous coal, formerly called pit-coal, in contradistinction to charcoal produced from wood, which was the fuel employed in this country previously to the introduction of pit-coal in the smelting and manufacture of iron. Now, as there are districts in which there are to be found large quantities of iron-stone, mine or ore, in the immediate neighbourhood of what is known as stone-coal or anthracite coal, it has been long considered as a desirable object, to employ such *coal for the smelting and manufacture of iron; and, although attempts have been made to apply such description of coal in the smelting and manufacture of iron, the same have failed and have been abandoned. In addition to such advantages to be obtained from the using of anthracite or stone-coal, in the districts where such coal is found together with iron-stone, mine or ore, from the practice I have had, I am induced to believe such coal, from its properties, will be found to produce a quality of iron more nearly resembling iron obtained by the aid of vegetable charcoal. Now, the object of my invention is the application of such anthracite or stone-coal, combined with a hot-air blast, in the smelting or manufacture of iron from iron-stone, mine, or ore. And, in order to give the best information in my power for enabling a workman to carry out my invention, I will describe the process or means pursued by me; and, in doing so, I will suppose the furnace of an ordinary construction to be in blast, and that the machinery and apparatus are adapted for the application of hot-air blast, as is well understood and extensively applied in many places where the ordinary fuel (coke of bituminous coal, or the coal in a raw state) is employed in the manufacture of iron from iron-stone, mine or ore; and I have found a furnace having suitable apparatus for making a blast to about 600° Fahrenheit a good arrangement for carrying out my invention, though so high a degree of temperature is not indispensably necessary, but I believe preferable. In charging

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such a furnace, I throw in about 3 cwt. of anthracite or stone-coal or culm, to each 5 cwt. of calcined argillaceous iron-stone, with a proper quantity of flux, as if working with the coke of bituminous coal. Such charging of the furnace, and the general working, with the exception of the using of anthracite or stone-coal, is to be pursued as if working with coke of *bituminous coal: and I would remark that the quantities above given, are such as I have hitherto employed in making the best qualities of pig iron, viz. No. 1 or No. 2, at my works, from the anthracite, stone-coal, or culm found in the neighbourhood of the Ynisedwyn iron-works; but these quantities may be varied, according to local circumstances, and the refractory nature of the iron-stone, mine or ore, or otherwise to be reduced, and the quality of iron desired to be obtained, as is the case in ordinary working, and at the judgment and discretion of the manager, as heretofore: and I would remark that the anthracite or stone-coal, or culm, may be coked in like manner as bituminous coal before charging the furnace; but from my experience, I have not (so far as my practice goes, in working with the coal obtained in my neighbourhood), found that such coking is necessary, or that a more advantageous result is obtained than in applying the anthracite or stone-coal directly from the mine. And it is desirable to observe, I have found it of advantage that the blast of hot air should be as free and unimpeded as possible, and that from that account I have hitherto used only anthracite or stone-coal, the smaller parts of which would not pass through a sieve of an inch mesh, but, where the pillar or volume of blast is considerable, say 2 lbs. and upwards on the square inch, this precaution is not necessary.

“Having thus described the nature of my invention, and the manner of carrying the same into effect, I would have it understood that I do not claim the using of hot-air blast separately in the smelting and manufacture of iron, as of my invention, when uncombined with the application of anthracite or stone-coal and culm; nor do I claim the application of anthracite or stone-coal in the manufacture or smelting of iron when uncombined with the using of hot-air blast; but what I do claim as *my invention, is the application of anthracite or stone-coal and culm combined with the using of hot-air blast in the smelting and manufacture of iron, from iron-stone, mine or ore, as above described. In witness,” &c.

The plea then averred that the said alleged improvement, in the patent and specification mentioned, was not a new manufacture

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invented by the plaintiff within the intent and meaning of the statute (1) as to the public use and exercise thereof; by reason whereof the said letters patent were void.

Fourth plea—that the nature of the said invention, and the manner in which the said invention was to be performed, were not particularly described, according to the intent and meaning of the letters patent, in or by the specification.

The fifth plea (after referring to the specification, and setting out the proviso in the patent, that nothing therein contained should give privilege to the plaintiff, his executors, &c., to use or imitate any invention or work theretofore invented or found out by any other person and publicly used or exercised, unto whom letters patent had been granted) then proceeded to aver the grant of certain letters patent to one James Beaumont Neilson, dated the 11th of September, 9 Geo. IV. (1828); whereby was granted to Neilson, for fourteen years, the sole privilege to make, use, exercise, and vend a certain invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus were required; that the said improved application of air in the last-mentioned patent, was the production and application of a hot-air blast for the purpose of heating fires in forges and furnaces where bellows, &c., were required; which said hot-air blast was *long before the plaintiff's patent, publicly used and exercised in the smelting and manufacture of iron, from iron-stone &c., and was the hot-air blast in the plaintiff's specification mentioned; that Neilson's patent was still in force, and that, in consequence thereof, the plaintiff could not use the said hot-air blast, in the smelting or manufacture of iron, without Neilson's licence; that the plaintiff obtained such licence before the grant of his patent; and that the using by the plaintiff of the hot-air blast, in the manner in the said specification mentioned, in the smelting and manufacture of iron, from iron-stone, &c., as described in the said specification, combined with the said anthracite or stone-coal and culm, as therein mentioned, was a using and imitating of Neilson's invention; which rendered the plaintiff's patent void. Verification.

Replication. The plaintiff joined issue on the first, second, and fourth pleas.

To the third plea, the plaintiff replied that the improvement in the patent mentioned and described in the specification, was a

new manufacture invented by the plaintiff, within the intent of the statute, as to the public use and exercise thereof ; whereon issue was joined.

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To the fifth plea, the replication, after referring to the proviso in Neilson's patent, as to the specification, averred the due inrolment of the specification, and set it out as follows ; (after reciting the grant of the patent &c., with the proviso as to the specification :

" Now, know ye, that in compliance with the said proviso, I, the said J. B. N., do hereby declare that the nature of my said invention for the improved application of air to produce heat in fires, forges and furnaces where bellows or other blowing apparatus are required, and the manner in which the same is to be performed, are particularly described and ascertained as follows ; that is to say, a blast or current of air must be produced by bellows *or other blowing apparatus in the ordinary way, to which mode of producing the blast or current of air this patent is not intended to extend. The blast or current of air, so produced, is to be passed from the bellows or blowing apparatus into an air-vessel or receptacle made sufficiently strong to endure the blast, and through and from that vessel or receptacle, by means of a tube, pipe or aperture, into the fire, forge or furnace. The air-vessel or receptacle must be air-tight or nearly so, except the apertures for admission and emission of the air ; and at the commencement and during the continuance of the blast it must be kept artificially heated to a considerable temperature. It is better that the temperature be kept to a red heat, or nearly so ; but so high a temperature is not absolutely necessary to produce a beneficial effect. The air-vessel or receptacle may be conveniently made of iron ; but, as the effect does not depend upon the nature of the material, other metals or convenient materials may be used. The size of the air-vessel must depend upon the blast, and on the heat necessary to be produced. For an ordinary smith's fire or forge, an air-vessel or receptacle capable of containing 1,200 cubic inches will be of proper dimensions ; and for a cupola of the usual size for cast-iron founders, an air-vessel capable of containing 10,000 cubic inches, will be of a proper size ; for fires, forges, or furnaces upon a greater scale, such as blast-furnaces for smelting iron, and large cast-iron founders' cupolas, air-vessels of proportionally increased dimensions and numbers are to be employed. The form or shape of the vessel or receptacle is immaterial to the effect, and may be adapted to the local circumstances or situation. The air-vessel may generally be conveniently heated by a fire distinct from

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the fire to be affected by the blast or current of air ; and generally it will be better that the air-vessel, and the fire by which it is heated, should be enclosed in *brickwork or masonry, through which the pipes or tubes connected with the air-vessels should pass. The manner of applying the heat to the air-vessel is, however, immaterial to the effect, if it be kept at a proper temperature. In witness whereof," &c.

The replication then averred that Neilson's invention for the improved application of air to produce heat in fires &c., as the same was described in Neilson's specification, was not the same as the hot-air blast, and the machinery and apparatus adapted for the application thereof, mentioned and referred to in the plaintiff's specification as then being well understood and extensively applied in many places, where the ordinary fuel was employed in the manufacture of iron, from iron-stone &c.; nor was the using by the plaintiff of his said invention, as described in his said specification, a using or imitating of Neilson's invention described in his specification. Verification.

Rejoinder, to the replication to the fifth plea ; that Neilson's invention was the same as the hot-air blast, and the machinery and apparatus adapted for the application thereof, mentioned in the plaintiff's specification, and that the using by the plaintiff of his invention, as described in his specification, was a using and imitating of Neilson's invention described in his specification. Issue thereon.

The following notice of objections was delivered by the defendants, with the pleas, under the stat. 5 & 6 Will. IV. c. 83, s. 5 (1).

"First, that the alleged invention mentioned in the declaration, —which the plaintiff in his specification claims and alleges to consist in the application of anthracite or stone-coal and culm, combined with the using of hot-air blast, in the smelting and manufacture of iron from iron-stone, mine or ore,—is not a new manufacture, within the meaning of the stat. 21 Jac. I. c. 3, s. 6, for which a *patent can be granted, but only a using at the same time of a well-known article, namely, anthracite or stone-coal and culm, and of the hot-air blast (the latter admitted in the plaintiff's specification to be then well-known), each separately in use for smelting and manufacturing iron before the date of the said letters patent. Secondly, that anthracite or stone-coal and culm, had been publicly used as the only fuel in the smelting and manufacture of iron by Mr. Thomas Harper, at his furnace, at Abercrave, in the county of Brecon, and

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had been so used mixed with other fuel, by the British Iron Company, at their works at Abercrave aforesaid, and at the Ynisedwyn iron-works, the Landore iron-works, the Milbrook iron-works, and the Neath Abbey iron-works, in the county of Glamorgan, before the date of the said letters patent ; and the alleged invention of the plaintiff is only the use of anthracite or stone-coal or culm with the hot-air blast. Thirdly, that the using of hot-air blast in the smelting or manufacture of iron, was not the invention of the plaintiff, but was well-known and in use before the granting of the letters patent to the plaintiff, as admitted in the specification thereof, and the alleged invention of the plaintiff is only the use of the said hot-air blast, with the well-known anthracite, or stone-coal and culm ; and that the hot-air blast was used in the smelting and manufacture of iron prior to the said letters patent, at the works of the said plaintiff, the Ynisedwyn iron-works, &c. ; (here followed a list of sixteen iron-works, where the hot-air blast had been in use) : and also at a great many iron-works in the kingdom, too numerous to be individually specified. Fourthly, that the alleged invention of the plaintiff necessarily involves the use of another invention, which was patented before the date of the plaintiff's letters patent, viz. the hot-air blast of J. B. Neilson ; and that the application thereof to anthracite or stone-coal, which was a well-known fuel, was an application that all persons were at liberty to make who had permission to use the said invention of the said J. B. Neilson. Fifthly, that the exclusive use of the hot-air blast having been previously granted to J. B. Neilson by letters patent, the subsequent patent, granted to the plaintiff for the same invention, is void. Sixthly, that anthracite or stone-coal and culm having been well known and in use as a fuel, prior to the said plaintiff's letters patent, the application of such fuel to the smelting or manufacture of iron by well-known methods is not a new manufacture, within the meaning of the statute. Seventhly, that the use of the hot-air blast, described in the said specification, produces substantially only the same effect when the anthracite or stone-coal or culm is used as fuel in the smelting and manufacture of iron, as when any other kind of coal or coke is used for the same purposes. Eighthly, that the specification is defective, inasmuch as it does not describe the kind of furnace to which the alleged invention is applicable, and it is not applicable to all kinds of furnaces. Ninthly, that the said specification does not clearly state, whether or not it is intended to apply to the use of anthracite or stone-coal and culm, as the only fuel, or

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whether it is intended to include the use of anthracite or stone-coal and culm, together with other fuel."

At the trial before Tindal, Ch. J. at the sittings at Westminster, after Hilary Term, 1840, the plaintiff (besides Neilson's specification, as set out in the replication to the fifth plea) gave the following specifications in evidence :

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"First, that of an invention of Thomas Botfield, for "certain improvements in the manufacture of iron," inrolled on the 1st of April, 1828, under a patent, dated the 2nd of January, 1828. The principle of this invention was stated by the patentee as follows : "for causing or obtaining a blast of atmospheric air, sufficient to smelt, fuse, run or make pig, cast or crude iron, from iron-stone *or ore. This blast is to be produced by means of rarefied air, gas, flame or heated air, from an oven or fire-place, and is to be applied in or to a blast-furnace, cupola, or air-furnace: this I propose to effect by the draught of a powerful chimney or chimneys, which may be built separate, at any distance that may be most convenient, or may join to or be made part of the blast-furnace or cupola, as may be found most desirable and best to answer the purpose required, and which is to be connected by a flue or flues with the cupola, blast, or air-furnace; but, in case this draught should not prove sufficient for the purpose of smelting the iron-stone or ore, I propose and intend to apply and use the common blast from machinery to assist the blast from the draught of the machinery: and I claim a right to use, and mean to use the atmospheric air, either separately or mixed with gas, flame, or heated air. I also claim as part of my patent the right to use and mix with other materials, rock salt, common refuse or other salt, in any state or degree of refining, or any other substance of which soda (the mineral alkali) forms a part. This is to be mixed in the blast-furnace, cupola, or air-furnace, with the iron-stone or ore, and with the other usual materials, of coke, or charcoal, and limestone, to which cinder (produced in the processes of converting pig, cast or crude-iron, into malleable iron) may be added. And I propose, as I shall find necessary, to cause the iron-stone or ore to smelt or fuse sooner or with less blast, fuel, or heat." And in another part of the specification, the patentee stated, "And I further declare that I propose to use coal, coke, stone-coal, culm, wood, charcoal, or any other kind of fuel or fuels, or combination of fuel, in any proportion or proportions, in the fire-place, oven, or air-furnace, for producing the gas, flame, or heated air; and also to

use all the materials before recited, in any proportion or proportions that may be found sufficient and *best adapted to produce the main object required. I claim, as my patent, the use of the additional chimney or chimneys, and the application of rarefied air, gas, flame, or heated air, to, at, or near the twire or twires of the blast-furnace or cupola, to cause or assist the blast of atmospheric air. And I also claim, as part of my patent, the use of salt, or any other substance containing soda, to mix with the iron-stone or ore, and other materials in the blast, cupola or air-furnace, to cause those materials to melt or fuse sooner, more easily, or with less blast and fuel."

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Secondly, that of an invention of Edward Martin, inrolled the 23rd of June, 1804, under a patent of the same date, "for making pig and cast iron of every description from iron-stone, iron-mine, and iron-ore, and of smelting, preparing and refining of pig and cast iron of every sort, and for the making of such pig and cast iron into wrought or bar iron by using raw stone-coal or culm to be worked and made by blast." In this specification the nature of the invention and the manner in which the same was to be performed, and the method used to make stone-coal and culm to stand the blast, were thus described: "To light the fire in the furnace, finery, or hearth, with free-burning wood, and, as soon as the wood is sufficiently ignited, then to put on small quantities of raw stone-coal or culm, free of dust (broken into the size of a common hen's egg), to continue to feed the furnace, finery or hearth with raw stone-coal or culm, till it is quite full of vivid fire, before any blast is introduced; then (in making pig or cast iron) charge the furnace, in the common way with due proportions of raw stone-coal or culm clear of dust (instead of coke or charcoal), with iron-stone, iron-mine, or iron-ore, and lime-stone; then to introduce the blast in a very gentle manner for the first twelve hours; then to increase the blast gradually, day after day, for the first week of blowing, *till the furnace is sufficiently hot and burthened, and then to blow to any extent, the machinery or the furnace is capable of bearing; and by keeping the furnace regularly and properly fed with materials, and keeping up a sufficient blast, the process will be completed. And in the remelting, preparing and refining of pig and cast iron of every sort, and for making such pig and cast iron into wrought or bar iron, the foregoing method of lighting and feeding the hearth or finery till it is full of vivid stone-coal or culm, must be pursued before the finery or hearth is charged with metal,

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or the blast introduced ; then, by charging with metal, and feeding the finery or hearth with raw stone-coal or culm (instead of coke or charcoal), and by introducing the blast in the common way, the wished-for success will be produced."

Thirdly, that of an invention of Philip Taylor, inrolled on the 17th of February, 1826, under a patent, dated the 5th of the same month, for "certain improvements in making iron." The principle of this invention was, the introduction, into the furnace in which anthracite or stone-coal was to be used, of carburetted hydrogen gas.

And, fourthly, that of an invention of Charles Pierre Devaux, inrolled on the 8th of April, 1836, under a patent dated the 28th of October, 1835, for "certain improvements in smelting iron-stone or iron-ore."

This specification stated the invention in these terms : "The improvements relate to the placing or arranging of apparatus between the ordinary blowing-machine and the furnace which contains the iron-stone or iron-ore to be smelted, whereby the blast of atmospheric air caused by the ordinary blowing machinery is forced through and amongst the fuel in a fire enclosed in such superadded apparatus, and whereby the atmospheric air so forced supports combustion in such fire, becomes heated, and in some degree decomposed, and is *thence constantly forced forward by the pressure of the condensed air in the apparatus (carrying with it the gas and vapours evolved by the fuel in the fire) into, and becomes a heated and gaseous blast to, the ordinary furnace containing the iron-stone or iron-ore to be smelted, great improvement will take place in the process of smelting iron-stone or iron-ore, and fuel saved."

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Numerous witnesses were called on the part of the plaintiff, who were employed in the manufacture of iron, many of them in the neighbourhood of the plaintiff's works. Their evidence went to show, that repeated attempts had been made to use anthracite coal in the manufacture of iron ; that it was an object greatly desired by the trade ; that the British Iron Company had succeeded in using it, but that the iron produced was inferior in quality and not worth the cost of manufacture, and that the Company had, in consequence, abandoned their works. Other instances were adduced, where similar attempts had failed. In February, 1837, the plaintiff, after frequent and expensive experiments, began to use the hot-air blast and stone-coal ; the apparatus for the hot-air

blast having been erected under the direction of one of Neilson's men. The plaintiff however (finding that the air vessel used by Neilson did not give a sufficient degree of heat) soon afterwards substituted for it a coil or succession of tubes, so as to cause a larger surface of air to be exposed to the influence of the fire in the transit from the blowing apparatus to the furnace; whereby a hot-air blast sufficient to melt lead (about 600° Fahrenheit) was produced; that the iron thus produced was of a very superior quality; that the yield was greater, and the consumption of fuel less by one sixth; that since the plaintiff's discovery two manufactories had been commenced upon his system; that in April or May, 1837, the defendants were using hot-air blast, and stone-coal *together with coke, in the proportion of one third of the former to two thirds of the latter. It was also proved that cold blast blows anthracite coal black; which had been the cause of the failure of Martin's invention; that Taylor's invention had altogether failed, and that Botfield's was not applicable to anthracite coal; and that the description in the plaintiff's specification was sufficient to enable persons of competent skill, successfully to apply the invention.

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The counsel for the defendants, after stating that no witnesses were to be called for the defence, was proceeding to argue that the plaintiff's invention was not a new manufacture; when it was suggested by the LORD CHIEF JUSTICE that there was no point to leave to the jury, and that the real question was one of law, namely, as to the meaning of the word "manufacture" under the statute; whether the application of a known mode of working the hot-air blast to a known material, so as to produce a new effect, is a manufacture; and also whether, if it be so, the plaintiff was the first inventor of it. It was therefore agreed that a verdict should be entered for the plaintiff, with nominal damages, upon all the issues, subject to a motion, on the part of the defendants, to enter a nonsuit or verdict for them, with leave to turn the evidence into a special case.

Sir Thomas Wilde, Serjt., in Hilary Term, 1840, having accordingly obtained a rule *nisi* to enter a nonsuit or a verdict for the defendants, it was arranged that the evidence should be turned into a special case; the Court being at liberty to draw the same inferences from the evidence that a jury might draw; if the Court should be of opinion that the plaintiff was entitled to retain

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the verdict on all the issues, then the verdict was to stand as entered ; but if the Court should be of opinion that the defendants were entitled to have the verdict entered *for them on all or either of the issues, then the verdict was to be altered accordingly : if the Court should be of opinion that the defendants were entitled to have the verdict entered for them on the third and fourth issues, or either of them, the Court were to be at liberty, if they should be so advised, to give judgment *non obstante veredicto*. In case the verdict for the plaintiff should stand, the LORD CHIEF JUSTICE was to be at liberty, if he should think fit, to certify on the record that the validity of the patent came in question before him, pursuant to the statute 5 & 6 Will. IV. c. 83, s. 3.

The case was argued in Hilary Term, 1842 (1).

Bompas, Serjt. and *Rotch* for the defendants :

As to the first issue : there was no infringement of the plaintiff's patent proved. The plaintiff's invention was the simple application of Neilson's patent to the use of anthracite coal in smelting iron. The plaintiff's specification does not state the proportions or method to be observed in the manufacture ; but merely that stone-coal with the hot-air blast, is to be used in the ordinary way. The plaintiff cannot contend that his patent would be infringed by the application of hot air to stone-coal in combination with other fuel in any proportions whatsoever. There are extensive districts where the coal is more or less anthracitous ; in such places the proportions of anthracite and of bituminous coal which manufacturers may use, could not be ascertained. According to the evidence, the defendants used only a small proportion of anthracite compared to the quantity of coke. But the mere using of some anthracite with the hot blast could not amount to an infringement of the plaintiff's patent, supposing that patent to be valid.

[*596] As to the second and third issues : the plaintiff is neither the first inventor of the alleged improvement, *nor is the invention a " new manufacture " within the meaning of the statute.

The patent is for " an improvement in the manufacture of iron." No improvement is suggested throughout the plaintiff's specification, whereby an improved quality of iron is to be obtained. All that is there stated is, that the alleged invention of the plaintiff will produce iron more like that obtained by the aid of vegetable charcoal. The process used by the plaintiff contains nothing new.

(1) Before Tindal, Ch. J., and Coltman, Erskine, and Maule, JJ.

The hot-air blast was not new—that was the subject of Neilson's patent. The use of anthracite coal was not new: it had been previously used by a number of persons. The plaintiff's specification, therefore, reveals no novelty of detail. It is true that an improved method in the application of a former discovery, or a new combination of machinery, the details of which were already known, may be the subject of a patent; but the mere use of a thing already known, in a known manner, and for a known purpose, has frequently been decided not to be the subject of a patent: *Brunton v. Hawkes* (1); *Saunders v. Aston* (2); *Cornish v. Keene* (3); *Kay v. Marshall* (4). In *Minter v. Mower* (5) the patent was held to be bad, as including the subject of a former invention. In this case the plaintiff's patent includes the invention of Neilson.

As to the fourth issue: the specification is insufficient, inasmuch as it does not describe the sort of furnace requisite to be used. It appeared from the evidence that the invention failed when used with a large furnace.

As to the fifth issue—whether the hot-air blast described in the plaintiff's specification is to be obtained in the same manner as that for which Neilson had obtained *a patent—there was no evidence to show that there was any other hot-air blast in use in England, except under Neilson's patent, the validity of which had been fully established. * * *

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Sir Frederick Pollock, A.-G., R. V. Richards, Montague Smith, and Webster for the plaintiff:

Under the arrangement entered into at Nisi Prius, it is submitted that it is not now open to the defendant to dispute the infringement of the plaintiff's patent. But even if it were so, there was abundant evidence to entitle the plaintiff to a verdict on that issue. In order to entitle the plaintiff to maintain this action, it is sufficient to show that the defendants used anthracite coal in combination with hot-air blast, in considerable quantities; he was not called upon to prove that it was the only kind of coal used in their manufacture.

Upon the second issue—whether the plaintiff is the first inventor—it is not pretended that any other person had successfully used anthracite coal combined with the hot-air blast, in the manufacture of iron; others had made the attempt indeed, but had failed.

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| (1) 23 R. R. 382 (4 B. & Ald. 541). | (4) 50 R. R. 759 (5 Bing. N. C. 492; |
| (2) 37 R. R. 574 (3 B. & Ad. 881). | 7 Scott, 548). |
| (3) 43 R. R. 747 (3 Bing. N. C. 570; | (5) 45 R. R. 605 (6 Ad. & El. 735; |
| 4 Scott, 337). | 1 N. & P. 595). |

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The third issue is the most important in the case,—viz., whether the combination of which the plaintiff claims the invention, and for which he has obtained his patent, is a “new manufacture” within the statute of James I. From the decided cases upon this subject it is not very easy to discover any general rule or principle by which the Courts have been guided. There can be no doubt, however, that a party may have a patent for any new *modus operandi* or combination, which shall produce an entirely new result. Now it is clear that, up to the period of the granting of the present patent, anthracite coal had been found thoroughly untractable and useless, for the purposes of smelting iron, and that to make it so serviceable was a great object in the trade. By the combination in the plaintiff’s invention, the object has been obtained; and the iron produced by this method is both cheaper and better. The most beneficial discoveries are often but new combinations of well-known substances or principles, producing new results. Such have been the subjects of patents in various cases. *Hall v. Boot* (1), *Forsyth’s* patent (2), *Derome’s* patent (3), *Hartley’s* patent (4), *Lewis v. Davis* (5), *Lewis v. Marling* (6), are authorities to this effect. Even the omission of any process in a manufacture, hitherto deemed essential, may be the subject of a patent: *Russell v. Cowley* (7). In *Strong v. De la Rue* (8), it was held that an invention for preparing paper, so as to render it more available for copper-plate printing, was valid. In *Hill v. Thompson* (9), *Lord ELDON laid down the rule “that there may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials.” In *Brunton v. Hawkes* (10), the invention, as stated in the specification, was not new. In *Saunders v. Aston* (11), and *Rex v. Metcalf* (12), the patents would have been held valid if the inventions had been properly described in the specification. *Cornish v. Keene* (13) is also an authority that a new combination of old materials, may be the subject of a valid patent.

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(1) Gods. Pat. 242; 1 Webst. Pat. Ca. 100.

(2) 1 Webst. Pat. Ca. 95.

(3) *Ib.* 152.

(4) *Ib.* 54.

(5) 33 R. R. 690 (3 Car. & P. 502).

(6) 34 R. R. 313 (4 Car. & P. 52;

10 B. & C. 22; 5 Man. & Ry. 66).

(7) 40 R. R. 758 (1 Cr. M. & R. 864).

(8) 5 Russ. 322.

(9) 17 R. R. 156 (3 Mer. 626). S. C. 20 R. R. 488 (3 Moore, 424; 8 Taunt. 375; Holt, N. P. 636).

(10) 23 R. R. 382 (4 B. & Ald. 541).

(11) 37 R. R. 574 (3 B. & Ad. 881).

(12) 19 R. R. 713 (2 Stark. N. P. 249).

(13) 43 R. R. 747 (3 Bing. N. C. 586; 4 Scott, 337).

As to the fourth issue—that the invention was not sufficiently described in the specification—it appeared from the plaintiff's evidence that the specification was sufficient for all practical purposes. No evidence was called by the defendants to show that the description was inaccurate or insufficient; and the affirmative of the issue lay upon them.

The fifth issue raises two questions; 1st, whether the hot-air blast described in the plaintiff's specification, is the subject-matter of Neilson's patent; and 2ndly, whether a patent can be maintained for an invention which involves the subject of a former patent.

As to the first point, the evidence was almost sufficient to prove that Neilson's hot-air blast was inapplicable to the plaintiff's invention.

As to the second of these points, there are many cases which establish the principle,—in which valid patents have been granted for improvements upon the subject of existing patents, or for the application of a former patent in a new manner, or to a new material: *Hornblower v. Boulton* (1), *Fox, Ex parte* (2), *Lewis v. Davis* (3), **Harmar v. Playne* (4), *Huddart v. Grimshaw* (5), *Boulton v. Bull* (6), *Rex v. Wheeler* (7).

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Bompas, Serjt. was heard in reply.

TINDAL, Ch. J., now delivered the judgment of the COURT:

This was an action on the case for the infringement of a patent granted to the plaintiff on the 28th of September, 1836, for "an improvement in the manufacture of iron." The declaration was in the usual form; and the defendants pleaded thereto, first, that they were not guilty; secondly, that the plaintiff was not the true and first inventor of the said improvements; upon each of which pleas issue was joined; thirdly, after setting out at length the plaintiff's specification, the defendants pleaded that the alleged improvement therein described was not a new manufacture invented by the plaintiff, within the intent and meaning of the statute, as to the public use and exercise thereof within England; which allegation was traversed by the plaintiff in his replication; fourthly, the defendants pleaded, that the nature of the plaintiff's invention, and the manner in which it was to be performed, were not

(1) 3 R. R. 439 (8 T. R. 95).

(2) 1 V. & B. 67.

(3) 33 R. R. 690 (3 Car. & P. 502).

(4) 14 Ves. 130; 11 East, 101.

(5) Dav. Pat. Ca. 265; 1 Webst. Pat. Ca. 85.

(6) 3 R. R. 439 (2 H. Bl. 495).

(7) 20 R. R. 465 (2 B. & Ald. 345).

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particularly described or ascertained by the plaintiff in his specification; upon which plea issue was joined: and in their last plea, the defendants, after referring to the plaintiff's specification before set out in the third plea, stated the grant of letters patent dated the 11th of September, 1828, to one James Beaumont Neilson for "the improved application of air to produce heat in fires, forges and furnaces *where bellows and other blowing apparatus are required;" that Neilson's invention was the production and application of a hot-air blast, and was in public use, with Neilson's licence, in the smelting and manufacturing of iron from iron-stone, and was the hot-air blast in the plaintiff's specification mentioned; that the plaintiff could not use the hot-air blast in his specification mentioned, without Neilson's licence, and that he obtained such licence before the grant of his letters patent; and that the using by the plaintiff of the hot-air blast, in the smelting of iron from iron-stone, combined with the anthracite or stone-coal, as mentioned in the specification, was a using and imitating of Neilson's invention; whereby the plaintiff's patent was void. The plaintiff replied to this last plea, that Neilson's invention was not the same as the hot-air blast, and the machinery and apparatus adapted for the application thereof, mentioned and referred to in the plaintiff's specification, nor was the using by the plaintiff of the invention as described in his specification a using or imitating of Neilson's invention as described in Neilson's specification; which allegations were traversed by the defendants in their rejoinder.

At the trial before me, the verdict was entered for the plaintiff on all the issues, subject to the opinion of the Court upon the evidence given at the trial, as contained in a report agreed upon between the parties, the Court being at liberty to draw the same inferences from it as a jury might draw.

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Upon the argument, it was contended by the defendants that the verdict ought to be entered for them on each of the issues joined on the record: but as the main question between the parties turns on the third issue, which involves the question whether the invention of the plaintiff is a manufacture within the intent and meaning of the statute of James, that is, whether it is or is not the subject-matter of a patent, and, as the *determination of this issue in favour of the one party or the other will render the decision as to the other issues simple and free from difficulty, we will apply ourselves, in the first instance, to that question.

Now, in order to determine whether the improvement described

in the patent is or is not a manufacture within the statute, we must, in the first place, ascertain precisely what is the invention claimed by the plaintiff; and then, by the application of some principles admitted and acknowledged to govern the law relating to patents, and by the authority of decided cases, determine the question in dispute between the parties.

The plaintiff describes the subject of his invention to be, the application of anthracite or stone-coal, combined with hot-air blast in the smelting or manufacture of iron from iron-stone, mine or ore, and states distinctly and unequivocally, at the end of his specification, that he does not claim the using of a hot-air blast separately as his invention, when uncombined with the application of anthracite or stone-coal; nor does he claim the application of anthracite or stone-coal when uncombined with the use of hot-air blast; but that what he claims for his invention is, the application of anthracite or stone-coal, and culm, combined with the using of hot-air blast in the smelting and manufacture of iron from iron-stone, mine or ore. And the question therefore becomes this, whether—admitting the use of the hot-air blast to have been known before, in the manufacture of iron with bituminous coal, and the use of anthracite or stone-coal to have been known before in the manufacture of iron with the cold blast, but that the combination of the two together (the hot-air blast and the anthracite) was not known before in the manufacture of iron,—such combination can be the subject of a patent. We are of opinion, that if the result produced by such a combination is either a new article, or a better article, or a *cheaper article, to the public, than that produced before by the old method, such combination is an invention or a manufacture intended by the statute, and may well become the subject of a patent.

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Such an assumed state of facts falls clearly within the principle exemplified by ABBOTT, Ch. J., in *The King v. Wheeler* (1), where he is determining what is and what is not the subject of a patent, viz.: “It may perhaps extend to a new process, to be carried on by known implements or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better or a more useful kind.” And it falls also within the doctrine laid down by Lord ELDON, in *Hill v. Thompson* (2) viz.: “There may be a valid patent for a new combination of materials previously in

(1) 20 R. R. 465, 469 (2 B. & Ald.
345, 350).

(2) 17 R. R. 156, 159 (3 Mer. 622,
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use for the same purpose, or for a new method of applying such materials; but, in order to its being effectual, the specification must clearly express that it is in respect of such new combination or application."

There are numerous instances of patents which have been granted where the invention consisted in no more than the use of things already known, the acting with them in a manner already known, the producing effects already known, but producing those effects so as to be more economically or beneficially enjoyed by the public. It will be sufficient to refer to a few instances, in some of which the patents have failed on other grounds, but in none on the objection that the invention itself was not the subject of a patent. We would instance *Hall's* patent (1) for applying the flame of gas to singe off the superfluous fibres of lace, where the flame of oil had been used before for that same purpose: *De Rosne's* *patent (2), in which the invention consisted in filtering the syrup of sugar through a filter, to act with animal charcoal and charcoal from bituminous substances, where charcoal had been used before for the filtering of almost every liquid except the syrup of sugar; *Hill's* patent (3), above referred to, for improvements in the smelting and working of iron; there the invention consisted only in the use and application of the slags or cinders thrown off by the operation of smelting,—which had been previously considered useless for the production of good and serviceable metal,—by the admixture of mine rubbish. Again, *Daniell's* patent (4) was taken out for improvements in dressing woollen cloth, where the invention consisted in immersing a roll of cloth, manufactured in the usual manner, in hot water.

The only questions, therefore, to be considered with respect to the evidence are, was the iron produced by the combination of the hot-air blast and the anthracite, a better or a cheaper article than was before produced from the combination of the hot-air blast and the bituminous coal? and was the combination described in the specification new, as to the public use thereof in England? And upon the first point, upon looking at the evidence in the cause, we think there is no doubt that in the result of the combination of the hot-air blast with the anthracite or stone-coal, the yield of the furnace was more, the nature, properties and quality of the iron

(1) 1 Webst. Pat. Ca. 97.

(3) 17 R. R. 156 (3 Mer. 622).

(2) *De Rosne v. Farrie*, 40 R. R. 792
(1 Webst. Pat. Ca. 152).

(4) *Rex v. Daniell*, Gods. Pat. 274.

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were better, and the expense of making the iron was less, than under the former process, by means of the combination of the hot-air blast with the bituminous coal. It is to be observed, that no evidence was produced on the part of the defendants to meet that, given by the plaintiff on these points, and that it was a necessary *consequence, from the proof in the cause, that from the substitution of the anthracite, in whole or in part, in the stead and place of bituminous coal, the manufacture of iron should be conducted at a less expense.

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It was objected, in the course of the argument, that the quantity or degree of invention was so small that it could not become the subject of a patent—that the person who had procured a licence to use the hot-air blast under Neilson's patent, had a full right to subject to that blast coal of any nature whatever, whether bituminous or stone coal. But we think, if it were necessary to consider the labour, pains and expense encountered by the plaintiff in bringing his discovery to perfection, that there is evidence in this cause that the expense was considerable and the experiments numerous; but, in point of law, the labour of thought or experiment, and the expenditure of money, are not the essential grounds of consideration upon which the question, whether the invention is or is not the subject-matter of a patent, ought to depend; for if the invention be new and useful to the public, it is not material whether it is the result of long experiments and profound research, or whether of some sudden and lucky thought, or of mere accidental discovery. The case of *Monopolies* (1) states the law to be "that where a man, by his own charge or industry, or by his own wit or invention, brings a new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, and that for the good of the realm, the King may grant him a monopoly-patent for a reasonable time." And if the combination now under consideration be, as we think it is, a manufacture, within the *statute of James the First, there was abundant evidence in the cause, that it had, before the granting of the patent, been a great object or desideratum to smelt iron-stone by the means of anthracite, and that it had not been done before; indeed no evidence was called on the part of the defendants to meet that which the plaintiff brought forward. These considerations, therefore, enable us to direct that the verdict shall be entered for the plaintiff upon the third issue,—that this was a manufacture, and a

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(1) *Darcy v. Allein*, 11 Co. Rep. 84; Noy, 178.

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manufacture new as to the public use and exercise thereof within England and Wales.

On the same ground also the second issue is disposed of, in favour of the plaintiff. For no evidence was produced on the part of the defendants to show any inventor earlier than the plaintiff; nor did the fact that there was an earlier inventor appear from the cross-examination of the plaintiff's witnesses.

As to the first issue, namely, whether the defendants had infringed the patent, we think it clearly appears on the evidence that the defendants had used, either in part or in whole, the combination described in the specification of the plaintiff's patent.

The plaintiff's evidence goes fully to show such infringements, and is not met by any explanation on the part of the defendants. Indeed, the defendants' case did not appear to rest on this point, at the trial, so much as on the important question raised by them, whether the improvement described in the specification was a manufacture, within the statute of James.

Upon the fourth issue, which raised no more than the usual inquiry, whether the nature of the invention was sufficiently described in the specification, the usual evidence was given,—that persons of competent skill and experience could follow the directions, and produce the manufacture described, with success; and this evidence *was entirely unopposed. Upon this issue, also, the verdict ought to be entered for the plaintiff.

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With respect, however, to the issue raised in the rejoinder to the plaintiff's replication to the fifth plea, we are of opinion, that, taking the whole of the evidence brought forward by the plaintiff, it is impossible to find any substantial or real distinction between the hot-air blast and the machinery and apparatus described in Neilson's specification, and that, described and referred to in the plaintiff's, or to say that the using by the plaintiff of the invention described in his specification was any other than the using or imitating of the invention described in Neilson's specification. The plaintiff, indeed, worked by licence under Neilson's patent at the time of his discovery. Upon this fifth issue, therefore, we think the verdict should be entered for the defendants.

Then arises the question, whether the plaintiff is or is not entitled to a judgment notwithstanding the verdict, upon this fifth issue; on which point the argument on the part of the defendants is, that the taking out a patent for an invention, which invention cannot be used or enjoyed by the public, except by means of a former

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invention of another person, which former invention is itself the subject-matter of a patent still in force, is void by law. Undoubtedly, if the second patent claims, as part of the invention described in it, that which was the subject-matter of a patent then in force, it would be void, on the double ground, that it claimed that which was not new (which, indeed, would equally be the case if the former patent had expired), and also, that it would be an infringement of, and inconsistent with, a former grant of the King still in force, which latter consideration alone would make a new patent void. But, in this case, there is an express disclaimer as to any part of the invention of the use of the hot-air blast, *which was covered by Neilson's patent; the specification describes the application of hot-air blast to be well understood and extensively applied in many places where ordinary fuel is employed. The validity, therefore, of the plaintiff's patent cannot be impeached on either of the grounds above adverted to. Unless, therefore, the grantee of the new letters patent is bound by law to specify whether such former invention, which is excepted, was so excepted on the ground of its being generally known, and used by the public, or because it was the subject of a patent which secured the use of it to a former patentee, the new patent will be good. But that distinction is as much in the knowledge of the public as in that of the grantee of the patent. If, indeed, the new patent had been taken out for an improvement or alteration of an invention secured by a former patent, then, for obvious reasons, a greater particularity would be necessary to distinguish the new from the old. But the present specification expressly says, "I take the whole of an invention already well known to the public, and I combine it with something else." But, it is further argued, that in point of law no patent can be taken out, which includes the subject-matter of a patent still running and in force. No authority was cited to support this position; and the case in which Lord TENTERDEN held, that where an action was brought for an infringement of improvements in a former patent, granted to another person, and still in force, the plaintiff must produce the former patent and specification at the trial (1), affords a strong inference that the second patent was good. The case also of *Harmer v. Playne* (2) is a clear authority to the same point; and upon reason and principle there appears no objection. The new patent, after the expiration of the old one, would be free *from every

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(1) 33 R. R. 690 (*Lewis v. Davis*, 3 Car. & P. 502). (2) 11 East, 101.

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objection; and whilst the former exists, the new patent can be legally used by the public, by procuring a licence from Neilson, or by purchasing the apparatus from him or some of his agents; and the probability of the refusal of a licence to any one applying for it, is so extremely remote that it cannot enter into consideration as a ground of any legal objection.

Upon the whole, therefore, we hold that the verdict is to be entered for the plaintiff upon all the issues except the fifth; that the verdict is to be entered for the defendants on the fifth issue; but that, notwithstanding such verdict, the judgment must be given for the plaintiff.

Judgment for the plaintiff.

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MALONEY v. STOCKLEY.

(4 Man. & G. 647—650; S. C. 12 L. J. C. P. 92; 2 Dowl. N. S. 122.)

Debt for money had and received, and upon an account stated; *pleas, nunquam indebitatus*, payment and set-off.

An award that a verdict be entered for the defendant on all the issues is insufficient, as not deciding the set-off.

DEBT, for money had and received, and upon an account stated.

Pleas: first, never indebted; secondly, payment; thirdly, a set-off.

By an order of Nisi Prius, the verdict was entered for the plaintiff for the damages in the declaration, subject to the award of an arbitrator, to whom the cause and all matters in difference were referred, the costs of the cause to abide the event, and the costs of the reference to be in the discretion of the arbitrator. The arbitrator directed that the verdict should be set aside; that a verdict (generally) should be entered for the defendant; and that the plaintiff should pay the costs of the reference. It did not appear that there were any other matters in difference between the parties, except those in the cause.

Bompas, Serjt., on a former day in this Term, obtained a rule nisi to set aside the award, upon the ground that it had not decided all the matters referred, and *that it was not consistent, final, or certain. He cited *England v. Davison* (1).

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(1) 9 Dowl. P. C. 1052. [“Where a cause in which several issues are raised on the pleadings is referred, the arbitrator is bound to find expressly on each, although he is not requested

to do so by the parties.” It is conceived that this statement from the head-note is sufficient for all modern purposes.—F. P.]

Channell, Serjt. now showed cause :

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Whatever may be the effect of the new rule of H. 2 Will. IV. r. 74 (1), it is clear that, formerly, a general verdict for the defendant would have been good. In *England v. Davison* it was decided that where a cause in which several issues are raised is referred, the arbitrator is bound to find expressly on each, although he is not requested to do so by the parties. And, therefore, where in such a case the arbitrator had awarded merely that the plaintiff had no cause of action, and directed a verdict to be entered for the defendant, the award was held to be bad. It is difficult to reconcile that case with other decisions ; but even there the award was not set aside, but on the defendant allowing the costs on certain issues to be taxed for the plaintiff, and paying the costs of the rule, the award was permitted to stand. It may be, that the defendant in this case was never legally indebted to the plaintiff, but only morally so ; and he may have thought fit to pay that debt or to set off against it a legal debt due to himself. Here the arbitrator was not bound to direct that the verdict should be entered upon all the issues, unless distinctly requested so to do. In *Duckworth v. Harrison* (2) an action of assumpsit, to which the defendant had pleaded the general issue, and a set-off, having been referred, and the arbitrator having found that the plaintiff was *not entitled to recover, and had no cause of action against the defendant, but having said nothing as to the set-off, it was held that the award was final. *Williams v. Mouldsdales* (3) is to the same effect. These are express authorities that an award to enter a verdict for a defendant upon the general issue, and upon a plea of set-off, is not inconsistent ; and the plea of payment stands upon the same footing as that of set-off.

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(MAULE, J. : Suppose at the trial the plaintiff had failed in the proof of his case ; and the defendant had proved payment of 100*l.*, would not the verdict have been entered for the defendant on both issues ?

TINDAL, Ch. J. : But there is the plea of set-off. I cannot see how the arbitrator can have found for the defendant on the first plea, and also on the plea of set-off.

MAULE, J. : As to inconsistency, I think there is none. But as to the set-off, if the arbitrator had found a sum of money due from the

(1) By which it is ordered, that “ no costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded ; and the costs of all issues found for the defendant, shall be deducted from the plaintiff’s costs.”
(2) 51 R. R. 671 (4 M. & W. 432 ; 7 Dowl. P. C. 71).
(3) 56 R. R. 665 (7 M. & W. 134).

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plaintiff to the defendant, the plaintiff would have been bound to pay it; and the arbitrator should have made his award accordingly. Such would be the result, if the defendant never was indebted to the plaintiff, and there was a set-off due to the defendant; all matters in difference being referred to the arbitrator.)

It may be said that the arbitrator ought to have found the amount due from the plaintiff to the defendant, and have stated the deduction that was to be made, if any; but no such objection is stated in the rule.

(TINDAL, Ch. J.: I do not see how the objection is to be got over, that the arbitrator has not decided all matters in difference between the parties. I think the rule must be made absolute.)

Channell, Serjt. then proposed to abandon the issue upon the set-off, on the authority of *England v. Davison*; and to consent that the verdict should be entered upon *that issue for the plaintiff, and that the plaintiff should have the costs of that issue and of the action; to which

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Bompas, Serjt. consented.

Rule accordingly.

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THE AYLESBURY RAILWAY COMPANY v. MOUNT.

(4 Man. & G. 651—669; S. C. 5 Scott, N. R. 127; 11 L. J. C. P. 25;
2 Dowl. N. S. 143.)

By a Railway Act (6 Will. IV. c. lxxxvii., s. 95) the Company were empowered to sue subscribers for calls; and (sect. 96) the directors were empowered to make calls from the subscribers and proprietors for the time being; and if any owner or proprietor for the time being should neglect to pay the call, the Company might sue for the same, or the directors might declare the shares forfeited. And it was enacted (sect. 98), that in any action brought by the Company against any proprietor for the time being for calls, it should be sufficient to declare and allege "that the defendant, being a proprietor of a share in the said undertaking, is indebted &c. for a call or calls, &c., whereby an action hath accrued to the said Company by virtue of this Act," without setting forth the special matter; and on the trial it should only be necessary to prove that the defendant, at the time of making the calls, was a proprietor &c., and that the call was made and notice given. And (sect. 101) proprietors were enabled to sell their shares, subject to the rules and conditions therein mentioned; and it was provided that on every sale, the conveyance should be kept by the Company, who were to enter in a book a memorial of such transfer and sale, and indorse the entry thereof on the deed of sale and on the certificate of the share sold; and that, until such memorial should have been made and entered, the seller should remain liable for all future calls, and the purchaser should have no part of the profits, nor any interest or vote in respect of such share;

and no person (sect. 102) was to sell any share upon which a call should have been made, after the day appointed for the payment thereof, unless at the time of the sale he should have paid the full amount of the call.

Held (in C. P.), that the power to sue proprietors "for the time being," (under sect. 96) did not extend to persons who were not original subscribers and were not proprietors at the time the call was payable; and therefore, that where a proprietor had transferred his shares, after a call had been made, but before it was payable, such transfer having been duly entered and indorsed (under sect. 101) the Company had no right of action against such transferor.

In an action by the Company for a call, the declaration was, that "the defendant, before the commencement of the suit, to wit, on &c., being the proprietor of divers shares, before and at the commencement of the suit, was and still is, indebted to the Company in, &c.; whereby, and by reason of the said sum being unpaid, the defendant still is indebted, and an action hath accrued, &c."

Plea, that true it is that the defendant on, &c., was the proprietor of the shares in the declaration mentioned, but that after the making of the call, and before the same was payable, to wit on, &c., he transferred his shares to J. S., which transfer was duly entered and indorsed before the call was payable, whereby the defendant ceased to be proprietor of the shares, and to be liable to the call.

Held, in Cam. Scacc. in error, reversing the judgment of the Court of C. P. on demurrer to the plea,—that the declaration was good, either as an *indebitatus* count, or as disclosing a liability under the circumstances stated.

Held, also in error, that the plea was bad, as amounting to an argumentative plea of *nunquam indebitatus*.

DEBT. The declaration stated that the defendant, before the commencement of this suit, to wit, on the 6th day of March, 1838, being the proprietor of divers, *to wit, fifty shares in a certain undertaking, mentioned in a certain Act of Parliament, &c. (1), was,

(1) 6 Will. IV. c. lxxxvii.

The following sections of this Act were referred to in the argument:

Sect. 90 declares the time and manner in which dividends are to be made, and provides that no dividend "shall be paid, in respect of any share, after a day appointed for any call of money in respect thereof, until such call shall have been paid." [Cf. Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), s. 123.]

Sect. 91 enacts, "that the said Company shall, and they are hereby required, at their first or some subsequent general meeting, and afterwards, from time to time as occasion may require, to, cause the names of the corporations, and the names and additions of the several persons, who shall then be, or who shall from time to time thereafter become, entitled to shares in the said

undertaking, with the number of shares which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said Company; and, after such entry made, to cause their common seal to be affixed thereto." [Cf. Companies Clauses Act, 1845, s. 9.]

Sect. 93 enacts, "that the said Company shall, in some proper book to be provided by the said Company for that purpose, enter and keep a true account of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to any share therein; and every

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and the defendant before and at the time of the commencement *of this suit, was and still is, indebted to the said Company in the sum

proprietor of the said undertaking, &c. may at all convenient times have recourse to and peruse such book." [Cf. Companies Clauses Act, 1845, s. 10.]

Sect. 95 enacts, "that the several parties who have subscribed, or shall hereafter subscribe, for or towards the said undertaking shall, and they are hereby required to, pay the sums of money by them respectively subscribed for, or such parts or proportions thereof, as shall from time to time be called for by the directors of the said Company, under and by virtue of the powers of this Act, at such times and at such places, and to such persons, as shall be directed by the said directors; and in case any party shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, it shall be lawful for the said Company to sue for and recover the same in any court of law or equity, together with interest on such unpaid sum of money, at the rate of 5*l.* per cent. per annum, from the time when the same was directed to be paid up to the day of actual payment." [Cf. Companies Clauses Act, 1845, ss. 21, 23.]

[*653, n.] Sect. 96 enacts, "that the said directors shall have power from time to time to make such calls of money from the *subscribers and proprietors of the said undertaking for the time being, to defray the expenses of and to carry on the same, as they from time to time shall find necessary, so that the aggregate amount of calls made, or money paid for, or in respect of, any such shares shall not amount to more than the sum of 20*l.* on any such share, and so that no such call shall exceed the sum of 5*l.* upon each share which any person or corporation shall be possessed of or entitled unto in the said undertaking; and an interval of three calendar months at the least shall elapse between the day appointed for payment of one call and the day appointed for payment of another call,

and twenty-one days' notice at the least shall be given of every such call (by advertisements in certain newspapers); and all moneys so called for shall be paid to such persons, at such times and places, and in such manner as in the said notice shall be appointed; and the respective owners of shares in the said undertaking shall pay their rateable proportion of the money to be called for as aforesaid, to such persons, and at such times and places, and in such manner, as shall be appointed as aforesaid, &c. And if any owner or proprietor for the time being of any such share shall not so pay such his rateable proportion, then and in such case and as often as the same shall happen, he shall pay interest for the same, after the rate of 5*l.* per cent. per annum, from the day appointed for the payment thereof up to the time when the same shall be actually paid; and if any owner or proprietor for the time being of any such share shall neglect or refuse to pay such his rateable proportion, together with interest, if any, then, or at any time thereafter, it shall be lawful for the said Company to sue for and recover the same in any of His Majesty's Courts of record, by action of debt, or on the case, or by bill, suit, or information, as the said directors may and they are hereby authorized to declare the shares belonging to such owner to be forfeited, and to order such shares to be sold." [Cf. Companies Clauses Act, 1845, ss. 22, 23, 25, 29.]

Sect. 98 enacts, "that, in any action to be brought by the said Company against any proprietor for the time being of any share in the said undertaking, to recover any money due and payable for, or in respect of, any call, it shall be sufficient for the said Company to declare and allege that the defendant, being a proprietor of a share in the said undertaking, is indebted to the said Company in such sum of money as the calls in arrears shall amount to, for a call, or so many calls.

of 250*l.*, for a call of a certain sum of money, to wit, the sum of 5*l.* upon each of the said *shares, &c., whereby, and by reason of the said sum of 250*l.* being and remaining wholly unpaid, the defendant still is indebted to the plaintiffs in the same, and an action hath accrued, &c.

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of such sums of money upon a share belonging to the defendant, whereby an *action hath accrued to the said Company by virtue of this Act, without setting forth the special matter; and, on the trial of such action, it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given, as is directed by this Act, without proving the appointment of the directors who made such calls, or any other matter whatsoever: and the said Company shall thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid, upon such call, unless it shall appear that any such call exceeded 5*l.* per share, or was made payable before the expiration of three calendar months from the day appointed for the payment of the last preceding call, or that notice was not given as hereinbefore required: and, in order to prove that the defendant was a proprietor of such share in the said undertaking, as alleged, the production of the book in which the said Company is by this Act (s. 93) directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein." [Cf. Companies Clauses Act, 1845, ss. 26, 27.]

Sect. 101 enacts, "that it shall be

lawful for the several proprietors of shares in the said undertaking, and their respective executors, administrators and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions herein mentioned; and the conveyance of such shares shall be by writing, duly stamped, and may be in the following words, or to the like effect, varying the names and descriptions of the contracting parties as the case may require, that is to say, &c.: and on every sale the deed or conveyance (being executed by the seller and purchaser) shall be kept by the said Company, or by the secretary or clerk of the said Company, who shall enter in some book, to be kept for that purpose, a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer, for which entry and indorsement the sum of 2*s.* 6*d.* and no more shall be paid to the said Company; and the *said Company, or the secretary or clerk as aforesaid, is hereby required to make such entry or memorial accordingly, and on demand, to make an indorsement of such transfer on the back of the certificate of each share so sold, and deliver the same to the purchaser for his security; and such indorsement, being signed by such secretary or clerk, shall be considered in every respect the same as a new certificate; and, until such memorial shall have been made and entered as before directed, the seller thereof shall remain and be held liable for all future calls, and the purchaser shall have no part or share of the profits of the said undertaking, nor any interest in respect of such share paid to him, nor and note in respect thereof, as a proprietor of the said undertaking." [Cf. Companies Clauses Act, 1845, ss. 14, 15.]

Sect. 102 enacts, "that no person or

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Plea : that true it is, that before the commencement of this suit, to wit, on the said 6th of March, 1838, in the declaration mentioned, the defendant was the proprietor of the said shares in the undertaking in the said declaration mentioned ; and that the call in the declaration mentioned was made under and pursuant to the provisions of the said Act, for an instalment of 5*l.* per share, to be paid by the proprietors or owners of the capital of the Company on or before the 9th of April then next ensuing ; but that afterwards, and before the commencement of this action, and before the said 9th of April thereinbefore mentioned, when the said call was payable as aforesaid, to wit, on the 7th of April, 1838, he, the defendant, so being such proprietor as aforesaid, sold and disposed of all his said shares in the said undertaking (the said shares being the same shares in respect of which the plaintiffs claim to be paid the said call), to one Charles Thompson, and the said C. T. then took and accepted the same ; and the defendant then, to wit, on the said 7th of April, 1838, after the said call was *made &c., and before the same was due and payable, by a deed under the seal of the defendant, and also under the seal of the said C. T. (and which deed then being in the possession of the plaintiffs, the defendant was unable to bring the same into Court there), in consideration of the sum of 5*l.* paid to the defendant by the said C. T., did assign and transfer to the said C. T. the said shares in the declaration mentioned, to hold to the said C. T., his executors, &c., subject to the several conditions on which the defendant held the same immediately before the execution thereof ; and the said C. T. thereby then agreed to accept and take the said shares subject to the conditions aforesaid, as by the said deed, &c. : that the said deed was duly stamped before the same was executed by either party, and was made and executed according to the provisions of the Act: that the defendant and the said C. T. then duly delivered the said deed (the same then, and before the said call was payable, being first duly executed by both the defendant and the said C. T.) to the said Company, to be kept by the said Company according to the provisions of the said Act, and then requested the said Company to enter in the said Company's books

corporation shall sell or transfer any share which he or they shall possess in the said undertaking, upon which any call shall have been made, after the day appointed for the payment of the same, unless at the time of such sale

or transfer he or they shall have paid the full sum of money which shall have been called for, in respect of such share." [Cf. Companies Clauses Act 1845, s. 16.]

kept for that purpose, a memorial of the said transfer and sale, and to indorse the entry of the memorial on the said deed; which memorial and indorsement the said Company then, and before the said call became due and payable, made, according to the Act: and thereupon and before the said call became due and payable, to wit, on the said 7th of April, the said Company duly received the said deed on behalf of the said Company, the plaintiffs in this action, and then duly entered the memorial in the said Company's book, and then duly indorsed the entry of the memorial of the said deed according to the said Act, and then accepted and received the said transfer of the said *shares of the defendant to the said C. T., whereby the defendant then, and before the commencement of this action, and before the said call had become due and payable, ceased to be the proprietor and owner of the said shares, and then ceased to be liable to the said call, under and by virtue of the provisions of the said Act, in the declaration mentioned. Verification.

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Demurrer: assigning for causes, that the plea did not traverse, or confess and avoid, the cause of action stated in the declaration, or that the defendant was indebted as therein alleged; that, if the plea was pleaded by way of traverse, then the same was an argumentative, and not a direct, denial of the matters charged in the declaration, and improperly concluded with a verification instead of concluding to the country; that the plea amounted to a plea that the defendant never was indebted as in the declaration alleged, and should have been so pleaded; that, if the plea was intended to be pleaded by way of confession and avoidance, then the same did not sufficiently, or at all, confess that the defendant ever became or was indebted as in the declaration alleged; or, if it did sufficiently confess such liability, it showed no matter by which the same had been discharged: that the plea did not aver or show that C. T. ever became liable to pay the call; that the plea did not sufficiently admit or deny that the defendant was a proprietor of the shares in the declaration mentioned, or a subscriber to the undertaking at the time the call was made, or that due notice was given of the making of the call as required by the Act, or that the defendant ever became or was liable to pay the same calls, or was indebted to the plaintiffs as in the declaration alleged: that the plea was wholly immaterial, and admitted the cause of action stated in the declaration; that no single, certain or material issue could be taken thereon, &c. Joinder.

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The case was argued in last Michaelmas Term by

Channell, Serjt. (with whom was *Bovill*), in support of the demurrer :

He contended that, although the defendant had transferred his shares, and such transfer had been registered by the Company after the call had been made, and before it was payable, the defendant was not discharged from liability in respect of such call ; that the words " subscribers to, and proprietors of, the said undertaking for the time being," in the earlier part of the 96th section of the Act, must be taken to refer to parties who were subscribers and proprietors at the time of making the call ; that a similar construction must be put upon the words " proprietors for the time being " in the 98th section ; and there was nothing in the 101st and 102nd sections repugnant to that construction. He referred to *The Aylesbury Railway Company v. Thompson* (1), where the Court of Queen's Bench had decided that the transferee of these very shares was not liable to be sued in respect of them, not being the proprietor of them at the time the call was made. * * *

Stephen, Serjt., *contra*, argued that the declaration was bad in substance, as it did not allege that the defendant was a proprietor at the time that the action was brought, as it should have done. if framed upon the 98th section of the Act.

(TINDAL, Ch. J. : The Company are not limited to any precise form of declaration by that section. It merely says that " it shall *be sufficient for them to declare and allege " so and so.)

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The plea shows a good defence under the Act, viz., that although the defendant was the proprietor of the shares in question at the time the call was made, yet he had ceased to be so at the time the call became payable.

(TINDAL, Ch. J. : That construction would give great facilities for defrauding the Company. A proprietor might transfer his shares just before the call became due, and take them back again immediately afterwards.)

The contrary construction would bear equally hard in the case of a *bonâ fide* transfer. There is nothing in the Act to restrain the transfer of shares between the making of the call and the time

(1) 2 Railway Cases, 668.

when it becomes payable. The Company are bound to record the transfer, and before a transfer was recorded they would look for payment to the party who held the shares at the time the call was payable. Or if, as decided in *The Aylesbury Railway Company v. Thompson*, they cannot recover against the transferee, it may be that their remedy is wholly lost. The present defence could not have been set up under the plea of "never indebted" under the rules of pleading, H. T. 3 & 4 Will. IV. II. reg. 3.

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(TINDAL, Ch. J.: The plea of "never indebted" denies that the plaintiff ever had a cause of action, which seems to be all that the defendant would require in this case.)

The present plea confesses that the defendant was once a proprietor, and avoids the liability arising therefrom by showing that he ceased to be so before the call became due.

Channell, Serjt. was heard in reply.

Cur. adv. vult.

TINDAL, Ch. J. now delivered the judgment of the COURT :

This is an action of debt, brought by the Aylesbury Railway Company against William Mount, for a call upon certain shares in that Company. The declaration, *in substance, states that the defendant having, before the commencement of the suit, been a proprietor of shares, was, and still is, indebted to the Company for a call on each of his shares; and that, by reason of the call remaining unpaid, an action had accrued to the plaintiffs. The plea states, that the call was made payable on the 9th of April, and that the defendant transferred his shares by deed to one Charles Thompson, and that the Company entered a memorial of the transfer according to the provisions of the Act, before the call was payable. To this plea there is a demurrer; and the substantial question is, whether an action for a call can be maintained against a proprietor, who does not appear to have been an original subscriber, and who has transferred his shares, after an instalment of the subscription has been called for by the directors, and before the time appointed for payment of it.

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It is clear that, at common law,—that is, independently of the Railway Act,—the matters stated in the declaration do not show a cause of action; it is therefore necessary to consider whether the Act gives any right of action under the circumstances disclosed in

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the declaration. The Act in question is the 6 Will. IV. c. lxxxvii.. for making the railway therein mentioned; and it is obvious that the present question must be determined solely by reference to the clauses of that Act which bear upon it.

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The proprietors of shares (not being subscribers—whose case is provided for, by s. 95) are made liable by s. 96, which provides that the owners of shares shall pay the calls at the time appointed, and that if any owner for the time being shall refuse to pay, he may be sued, or his shares may be declared to be forfeited. It is clear that the remedy by forfeiture is a remedy against the owner for the time being, and is wholly inoperative against a person who has transferred his shares; the time being must, therefore, in this place, as far as forfeiture *is concerned, mean the time at which the call was payable; for it is at that time that the default on which the forfeiture accrues takes place; and the right to sue is clearly given against the same owner for the same time being. This 96th section, therefore, which is the only section that gives an action against a shareholder, gives it in express terms against owners for the time being, and does not give it to any other description of persons. Section 90, which provides that no dividend shall be paid on any share after a call shall be made, unless it shall have been paid, confirms this view of the effect of sect. 96, for as sect. 101 enables shareholders to transfer without limitation as to time, and sect. 102 prohibits sales only after the day of payment of a call, unless it be paid, it is clear that a sale may lawfully be made, and the Company be required to enter a memorial of such sale, after a call has been advertised, and before the day for payment has arrived; and sect. 90, by giving a remedy against the owner under the transfer, clearly assumes that he, and not the party who has transferred, and who has ceased to have any right to the dividends, is to be considered as the party to pay the call. In addition to these considerations, it may be observed, that although sect. 98 does not prohibit actions other than such as are within its provisions, and although, if a clear right of action were given by some other part of the Act against owners other than those for the time being, it would not be taken away by this section, yet its provisions go far to show that an action against a shareholder who had ceased to be an owner when the right of action arose, was not in the contemplation of the Legislature. This section is applicable in terms only to any action against any proprietor for the time being: the form of declaration

given by this section is, that the defendant, being a proprietor, is indebted to the Company for a call upon a share belonging to the defendant. *The case of a sale between the notice to pay an instalment and the day appointed for payment, is one so obviously likely to be of frequent occurrence, that it is probable that a form of proceeding applicable to such a case would have been provided, if it had been intended that in such a case the action should be against the former owner; and a similar or stronger remark arises from the absence of any express provisions for a continuing liability, if it were intended to exist. The provision in sect. 101 that the seller should continue liable till a memorial of the transfer is entered, and that, in sect. 102, prohibiting a transfer after a call is payable, seem to show that if any further liability on a shareholder who had transferred, or any further restraint on alienation, had been intended, it would have been expressly provided.

We are aware that in an action brought by *The Aylesbury Railway Company* against *Thompson*, the party to whom the present defendant had transferred the shares after a call made and before it was payable, the Court of Queen's Bench held that the defendant was not liable to pay the call, on the ground that the plaintiffs had not complied with the clause in s. 98, which provides "that on the trial of such action (*i.e.* against a proprietor for the time being), it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given as is directed by this Act, without proving the appointment of the directors who made such calls or any other matter whatsoever; and that the Company shall thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid, on such calls, unless it shall appear that any such call exceeded 5*l.* per share, or was made payable before the expiration of three calendar months from the day *appointed for payment of the last preceding call, or that notice was not given as hereinbefore required." The Court of Queen's Bench appears to have considered that this clause restricted the plaintiffs from recovering, unless they gave such proof as is mentioned therein. It was not necessary for that Court to decide whether an action would lie against a party situated as the present defendant is, nor did they decide that it was not necessary to allege and prove (if it were denied), as well that the defendant was a proprietor at the time of action brought, as at the time of the call. The 98th

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section indeed applies, in terms, only to actions brought against a proprietor for the time being : it assumes that it is established that the defendant is such a proprietor, and then makes the provision relied on by the Court of Queen's Bench, viz., "on the trial of such action, it shall only be necessary to prove," &c. In order that it may appear to be such action, the declaration is required to allege that the defendant, "being a proprietor, is indebted;" if that allegation be admitted, the admission shows it to be such action; if it be denied, the section immediately after the clause in question goes on to give a mode of proving it, in these words, viz., "and in order to prove that the defendant was a proprietor of a share in such undertaking, as alleged," the production of the book shall be *primâ facie* evidence &c. This Court is not called upon to say, whether the decision of the Queen's Bench is or is not correct; it is sufficient that it appears to us that no right of action for a call is given by the Act, or exists independently of it, against a party who having held a share at the time the call was made (but not appearing to be an original subscriber), has transferred and entered a memorial of his transfer, before the call is payable. It is clear that the declaration in the present case is not in the form given in s. 98 of the Railway Act; for, to be within that section, it should allege that the *defendant, being a proprietor of a share, is indebted to the Company; and there is no allegation in this declaration that the defendant, being a proprietor, is indebted.

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But as it might be that a right of action might be given by some other part of the Act, in a case such as that stated in this declaration, it was necessary to consider whether such right of action was in fact given. And it appears to us, on a review of all the material provisions of the Act, that there are not more than three cases, if indeed there be so many, in which an action for calls can be maintained; and these are, first, against a party who is owner for the time being, under s. 96; secondly, against a party who was a subscriber, under s. 95; or, thirdly, against a party who, having transferred his shares, is no longer a shareholder, but whose liability is continued by s. 101, in consequence of no memorial of the transfer having been entered. It is clear that the present declaration does not state either the first or the second of these three cases; as it does not allege the defendant to be a proprietor or a subscriber; but it may be contended that it substantially shows a case of the third description; and that it must be taken, not being demurred to, to insist on the right, which under s. 101

may exist against a former shareholder probably upon the true construction of the Act. Such a person ought to be treated as an actual shareholder.

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But supposing this to be otherwise, and that the declaration is to be considered as showing a sufficient cause of action, the declaration is well answered by the plea, which, on this supposition, is good in substance, because it shows that the defendant, having transferred his shares and entered a memorial of the transfer before the call was payable, is not liable; and also good in form, because, as it admits all the matters of facts stated in the declaration (which are only that the defendant was a proprietor, that a call was made, and that it remains unpaid) and by introducing affirmative matter not inconsistent *with those facts, shows that notwithstanding those facts the defendant is not liable; it confesses and avoids the matters of fact stated in the declaration, and properly concludes with a verification, and not to the country.

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It may be suggested that a party who becomes a shareholder, at once becomes liable to pay all the unpaid instalments that may be called for by the directors, and that consequently when an instalment is called for, it is *debitum in presenti, solvendum in futuro*, and that the shareholder at the time the call was made being the debtor, should therefore be the party to pay. But the general scope of the Act is, to treat a shareholder (at least one who takes by transfer, and is not an original subscriber), as identified with his share, and as having nothing to do with the Company, either with respect to rights or liabilities, before he becomes, or after he ceases to be, a shareholder; the express provisions of the Act, giving remedies by action, by forfeiture, and by withholding dividends against those who held the shares at the time the call was payable, and the absence of any express provision continuing the liability of a shareholder of whose transfer a memorial is entered, show that the Act considers the debt as not arising until the day appointed for payment. The duty of a shareholder who takes by transfer, to pay a call, is the creature of the Act: the Act requires the payment to be made at the time appointed by the directors; at that time, and not before, the duty arises; and it is a duty which, by the terms of the Act, is cast on the owner for the time being.

On the whole, therefore, we think that this action cannot be maintained, and the judgment ought to be for the defendant.

Judgment for the defendant.

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A writ of error having been brought in the Exchequer Chamber upon the foregoing judgment, the case was argued after Hilary Term, 1848 (1).

Bovill for the plaintiffs in error :

First, as to the liability of the defendant. The declaration states that he was and is indebted for calls, and by reason of the money being unpaid, still is indebted, and that an action hath thereby accrued by virtue of the Act. By sect. 96, the liability is imposed upon proprietors for the time being; and calls are to be made upon them, and are made recoverable from them by action. By sect. 98, the proof required in such action is, that the party was proprietor at the time of making the calls; and this shows the meaning of the expression "for the time being" in sect. 96, which is repeated in sect. 98. The liability, the remedy and the proof are therefore complete. The defendant insists that he is discharged from his liability by the sale and transfer of his shares, and the entry of such transfer. The general right of sale is given by sect. 101, and by the same section the Company are compelled to register the transfer; but such registry determines the liability of the seller as to future calls only. All the proceedings in this case appear to be regular. The Act clearly contemplates a transfer of shares; but it contains no clause to the effect that a liability, once imposed, is discharged by the transfer. On the other hand, the express provision that the registry of the transfer is to protect from future calls, shows that it was not to have the effect of discharging a proprietor as to prior calls. The declaration states a liability once existing on the part of the defendant; and, his plea, to be good, must admit that statement. There is certainly *nothing in the Act to discharge the entire liability; or to show that the call is not to be paid at all, but is to be wholly lost to the Company. Then if the liability continues, the question is, on whom it rests. The Court of Queen's Bench have decided, in *The Aylesbury Railway Company v. Thompson* (2), that the purchaser is not liable, because no liability is imposed upon him by the Act. It follows that as the call, and the liability expressly imposed thereby, are not discharged by the proceedings which the Act directs, the seller remains liable, and is the only party who is so.

(1) Friday, February 3rd. Before Lord Abinger, C. B., Parke, B., Alderson, B., Patteson, J., Coleridge, J., Rolfe, B., and Wightman, J. [For a

further report of this hearing, see 7 Man. & G. 898. The date is there given as Feb. 3, 1844.]

(2) 2 Railway Cases, 668.

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The judgment of the Court below, proceeds merely upon the ground that, as the Company have the option of declaring a share forfeited in case of non-payment of the call, and that as such forfeiture can be enforced only against the holder of the share at the time the call is payable, the remedy by action must also apply to him. But the forfeiture is an additional remedy given against the share which the purchaser agrees to take subject to the rules and conditions mentioned in the Act, this condition of forfeiture in case of the non-payment of the call being one of them. In such a case the purchaser would have a remedy over against the seller. In the same way, by sect. 90, no dividend is to be paid after a call is payable, until such call has been paid. So by sect. 71 the shareholder cannot vote until the call has been paid; but it is not said "paid by him." The liability is imposed upon, and the remedy by action is given against, the party who is the shareholder at the time the calls are made; and this is quite consistent with there being a remedy also against, the purchaser, affecting the share in his hands, although there may be no remedy against him personally. The judgment of the Court below, in throwing doubt upon that of the Queen's Bench in *The *Aylesbury Railway Company v. Thompson*, assumes that the words "for the time being," apply to a proprietor at the time calls are payable, but that is in fact the whole question.

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Secondly, as to the sufficiency of the declaration. The defendant being liable, the declaration properly describes his liability, which is imposed upon the proprietors at the time the call is made. The declaration follows the substance of the ninety-eighth section, which does not give any form in express words. It is good in substance therefore, and is not specially demurred to. It is also good as showing a liability under sect. 101; for upon the face of it the defendant might be a proprietor who had sold his shares, but their transfer had not been registered. It is also good as a common *indebitatus* count.

Thirdly, as to the plea. It is bad, inasmuch as it does not confess any debt or liability to pay. If it offers any defence at all, it is upon the ground that, before the defendant's liability to pay arose, an event occurred, namely, the transfer and registry, whereby he never became indebted; it is to the same effect as the plea denying notice of the calls, in *The Edinburgh, Leith and Newhaven Railway Company v. Hibblewhite* (1). The plea here

(1) 6 M. & W. 707.

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confesses a matter of inducement only, but gives no colour and contains no confession of a cause of action. So, if the declaration is good under sect. 101. In any point of view the plea is bad for not confessing and avoiding.

Biggs Andrews was heard for the defendants in error, in support of the judgment below.

Per CURIAM :

[*669] The plea is clearly bad, as amounting to a plea of never indebted. And the declaration may be sustained *upon one of the grounds put by *Mr. Bovill*, either as amounting to an ordinary *indebitatus* count, or as a count in the statutable form, disclosing a possible state of things under which the defendant might be liable by virtue of the Act of Parliament. Whether the defendant was or was not such a proprietor as to become liable to the call according to the Act of Parliament, would be matter of evidence at the trial.

Judgment reversed.

1842.
Nov. 7.

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(4 Man. & G. 783—793; S. C. 5 Scott, N. R. 610; 12 L. J. C. P. 34; 2 Dowl. N. S. 664; 7 Jur. 677.)

To trespass *quare domum fregit* by A. against B. and C., the defendants pleaded not guilty, and a justification by C. as owner, and B. as his servant. A. entered a *nolle prosequi* as to C., and as to B. replied an estoppel by reason of a demise by B. to A. from year to year.

The premises had been let to A. by a verbal demise from year to year, by D., the tenancy commencing at Michaelmas; D. devised them to his son C. (then a minor), charged with an annuity to B. (his widow). After the death of D., A. paid rent to B., both before and after C. attained his majority. A written agreement was afterwards (in March, 1836) entered into between A. and B., embodying the terms of the original letting. In March, 1840, A. was served with a notice to quit at the following Michaelmas, signed by B. and C. A., having refused to quit, was served with a further notice signed in like manner, that application would be made to the justices for a warrant to turn him out of possession, under the Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74) (1), and a "complaint" was consequently laid before the justices by C., "on behalf of himself

(1) Applied to recovery of possession by local authority under Small Dwellings Acquisition Act, 1899 (62 & 63 Vict. c. 44), by s. 5 (5).—A. C.

and B.," whereupon the warrant was executed, the plaintiff was ejected, and the key of the house was delivered to B. :

Held, that these facts were sufficient to connect B. with the trespass :

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Held also, that trespass was the proper form of action against B., under the statute, sects. 3 and 6 ; and,

Held also, that the allegation in the plea that C. was owner, and B. acted as his servant, though not denied by the replication, was not admitted, to the extent of entitling B. to arrest the judgment on the ground of a right of possession confessed to be in C.

TRESPASS, for breaking and entering the plaintiff's dwelling-house, &c. and seizing his household furniture, and casting it into the street, and ejecting and expelling the plaintiff and his family.

Pleas : first, not guilty. Secondly, that the said dwelling-house, &c. were, and at the time of the committing of the alleged trespasses, &c. were, and from time immemorial had been, within and parcel of the manor of Prees, in the county of Salop, and a customary tenement of that manor, demised and demisable by copy of the Court rolls of the said manor, by the lord of the said manor, or by his steward of the Court of the said manor for the time being, to any person or persons willing to take the same, in fee simple or otherwise, at *the will of the lord of the said manor, according to the custom of the said manor ; that, before the time when, &c., to wit, on the 14th of October, 1834, Sir Rowland Hill, Bart., then being the lord of the said manor, at his Court baron (1) then holden in and for the said manor, before &c., then being his steward of the Court of his said manor, by copy of the Court rolls of the said manor, granted to the defendant, Francis Wood Pritchard, the said dwelling-house &c., in which &c. to hold to the defendant, F. W. P., his heirs &c. for ever, by copy of the Court roll of the said manor, at the will of the lord of the said manor, according to the custom of the said manor ; by virtue of which grant the defendant, F. W. P., afterwards, and at the time of the committing of the first of the alleged trespasses, to wit, on the said 30th of September, 1840, entered into the said dwelling-house &c., and became and was seised thereof in his demesne as of fee, at the will of the lord of the said manor, according to the custom of the said manor : that before the time of the said entry so made by the defendant, F. W. P., as aforesaid, the plaintiff, claiming title to the said dwelling-house &c., under colour of a certain charter of demise pretended to be thereof made to him, before the committing of the said alleged

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(1) That is, at his customary Court, of which the lord or steward is the judge, held at the same time with the

Court baron, of which the free-holding suitors are the judges.

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PRITCHARD. trespasses, by one John Pritchard, for the term of his natural life, whereas nothing of or in the said dwelling-house &c., or any part thereof, ever passed by virtue of that charter, entered the said dwelling-house, &c., and was in possession thereof at the time of the said entry by the defendant, F. W. P., as aforesaid; and thereupon the defendant, F. W. P., in his own right, and the other defendant, Martha Pritchard, as his servant and by his command, at the *several times when, &c. broke and entered the said dwelling-house, &c., and committed the alleged trespasses therein and thereto, as in the said declaration mentioned; and because the said household furniture, &c. of the plaintiff, in the declaration mentioned, before and at the said time were wrongfully in and upon the said dwelling-house, &c., incumbering the same, and doing damage to the defendant, F. W. P., he, the said last-mentioned defendant, in his own right, and the said other defendant, M. P., as his servant and by his command, seized the said household furniture, &c. in the said dwelling-house, &c., so incumbering the same as aforesaid, and removed and carried away the same to a small and convenient distance, and there left the same for the use of the plaintiff, whereof the plaintiff then had notice, doing no unnecessary damage to the said household furniture, &c., on the occasion aforesaid, and then quietly ejected and expelled the plaintiff and his family from the possession of the said dwelling-house, &c., and kept and continued them so ejected and expelled from thence hitherto, as they lawfully might for the cause aforesaid; which were the same alleged trespasses &c. Verification.

The plaintiff entered a *nolle prosequi* as to the defendant F. W. P. The plaintiff joined issue upon the first plea, so far as the same related to and was pleaded by the said M. P.; and replied as to the second plea, so far as the same &c., that the said M. P. ought not to be admitted or received to plead the said plea by her above pleaded, as to so much thereof as alleged that the said F. W. P. at the several times when &c., was seised of the said dwelling-house &c., in which &c., in manner and form as in the said plea was alleged, because the plaintiff said, that, before the committing of the several trespasses in the declaration mentioned, and before the said several times when &c., or any or either of them, to wit, on the *24th of March, 1836, the said M. P. demised the said dwelling-house &c., in which &c., to the plaintiff; to have and to hold the same to the plaintiff for the term of one whole year thence next ensuing, and fully to be complete and ended, and so on, from year

o year, so long as the said M. P. and the plaintiff should respectively please, yielding the rent of 15*l.* payable half-yearly, to wit, on the 29th of September, and the 25th of March in every year, by even and equal portions; which said demise and tenancy from year to year continued in full force and undetermined until, at and after the said several times when &c. ; by virtue of which said demise the plaintiff afterwards, and before the said several times when &c., or any or either of them, entered into and upon, and became and was possessed of the said dwelling-house &c., in which &c., for the said term so to him thereof demised as aforesaid, and remained and continued so possessed thereof under and by virtue of the said demise from thenceforth until and at the said several times when &c., in the declaration mentioned: that afterwards, and before the said several times when &c., to wit, on the 29th of September, in the year last aforesaid, the plaintiff paid to the said M. P., and she the said M. P. then received from the plaintiff the sum of 8*l.* as and for the rent aforesaid, so reserved as aforesaid, for a certain time, to wit, for one half year ending on the day and year last aforesaid; and that afterwards, on each and every 25th of March, and 29th of September, which happened in every year from the time of the making of the said demise, until the said several times when &c., the plaintiff, as tenant as aforesaid, duly paid to the said M. P., and the said M. P. as the landlady of the plaintiff as aforesaid, received and accepted from the plaintiff, all and every part of the rent which respectively grew due to the said M. P. from the plaintiff under the demise and tenancy as aforesaid. Verification; *and prayer of judgment, if M. P. ought to be admitted or received against the said demise, and acceptance of rent as aforesaid, to plead the said plea by her above pleaded as to so much thereof as alleged that the said F. W. P. at the several times when &c., was seised of the said dwelling-house &c., in manner and form &c.

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Rejoinder: that, by reason of anything in the replication alleged, the defendant M. P. ought not to be barred from pleading the said plea by her pleaded, as to so much thereof as alleged that the said F. W. P., at the said several times when &c., was seised of the said dwelling-house &c., in which &c., in manner and form &c., because she says that the tenancy of the plaintiff of and in the said dwelling-house &c., was not in full force and undetermined (1) at the

(1) The rejoinder appears to be bad for not showing some matter by which the tenancy was determined.

DARLINGTON said several times when &c.: concluding to the country. Issue
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At the trial before Erskine, J., at the last Summer Assizes for the county of Salop, the facts of the case appeared to be as follows. At Michaelmas, 1823, the plaintiff became tenant from year to year of the premises in question (being copyhold of the manor of Prees in Shropshire), under a verbal agreement with one Robert Pritchard, the husband of the defendant Martha, and the father of the other defendant Francis Wood Pritchard, at the rent of 15*l*. a year, payable half yearly. R. P. died at Christmas, 1833, having devised the premises in question (with other property) to his son F. W. P., then a minor, charged with an annuity to his widow M. P. The defendant F. W. P. attained his majority in 1834, and in the month of October in that year he was duly admitted tenant of the premises. After the death of R. P., the plaintiff regularly paid the rent to his widow, the defendant Martha, down to the year 1836, when a dispute having arisen between her and the plaintiff, an agreement in writing was in the month of March in that year entered into between them, as follows:

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“ Mr. Darlington agrees to take from Mrs. Pritchard the house, garden and stable he now occupies, with the use of the pump in the yard, for the annual rent of 15*l*. to be paid half yearly.” (These being in fact the terms of the original tenancy.)

The plaintiff continued to pay rent to the defendant Martha.

On the 23rd of March, 1840, the following notice to quit was served on the plaintiff:

“ We, and each of us, do hereby give you notice to quit and deliver up to us upon the 29th day of September next, or at such other time as your holding may by legal notice be determined, the peaceable possession of the messuage, and all other the premises, which you now rent of or hold under us, or one of us, situate in the township of Prees, in the parish of Prees, in the county of Salop. Dated, the 23rd day of March, 1840.

(Signed)

“ MARTHA PRITCHARD.

“ F. W. PRITCHARD.”

The plaintiff having refused to quit at Michaelmas, 1840, was in October in that year served with a notice in writing signed by both the defendants, that they or one of them would apply to the magistrates to recover possession of the premises under the stat. 1 & 2 Vict.

c. 74 (1). The notice was in the form set out in the *schedule to the Act, No. I. (2). The “complaint” laid before the magistrates, was as follows:

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“Shropshire, to wit. The complaint of Francis *Wood Pritchard,

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(1) By sect. 1, after reciting that it is expedient to provide for the more speedy and effectual recovery of the possession of premises unlawfully held over after the determination of the tenancy, it is enacted, “that, when and so soon as the term or interest of the tenant of any house, land, or other corporeal hereditaments held by him at will, or *for any term not exceeding seven years, either without being liable to the payment of any rent, or at a rent not exceeding the rate of 20l. a year, and upon which no fine shall have been reserved or made payable, shall have ended, or shall have been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises, or only occupy a part thereof), any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord of the said premises, or his agent, to cause the person so neglecting or refusing to quit and deliver up possession, to be served (in the manner hereinafter mentioned) with a written notice, in the form set forth in the schedule to the Act, signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in this Act; and, if the tenant or occupier shall not thereupon appear at the time and place appointed, and show, to the satisfaction of the justices hereinafter mentioned, reasonable cause why possession should not be given under the provisions of this Act, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof, of which he is then in possession, to the landlord or his agent, it shall be lawful for such landlord or agent, to give to

such justices proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof, and, where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and, upon proof of the service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division or place within which the said premises or any part thereof shall be situate, in Petty Sessions assembled, or any two of them, to issue a warrant under their hands and seals to the constables and peace officers of the district, division, or place within which the said premises, or any part thereof, shall be situate, commanding them, within a period to be therein named, not less than twenty-one, nor more than thirty, clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent: &c. Provided also, *that nothing herein contained shall be deemed to protect any person, on whose application and to whom any such warrant shall be granted, from any action which may be brought against him by any such tenant or occupier, for, or in respect of such entry and taking possession, where such person had not, at the time of granting the same, lawful right to the possession of the same premises.”

[*789, n.]

[*790, n.]

(2) “I, _____, (owner, or agent to _____, the owner, as the case may be,) do hereby give you notice, that unless peaceable possession of the tenement, (shortly describing it,) situate _____, which was held of me, or of the said _____, (as the case may be,) under a tenancy from year to year, (or as the case may be,) which expired (or was determined) by notice to quit from the said _____, (or otherwise as the case

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of Hodnet, in the county of Salop, shopkeeper, on behalf of himself and Martha Pritchard of Prees, in the said county, widow, made before us, two of her Majesty's justices of the peace acting in and for the district of the Whitechurch division of Bradford North, in the county of Salop, in Petty Sessions assembled; who saith, that Robert Pritchard of Prees aforesaid, tanner, deceased, did in his lifetime let to A. E. Darlington a tenement consisting of a messuage, with a building, garden, and appurtenances thereto belonging, situate in the parish of Prees aforesaid, in the said county of Salop, for the term of one year, under the rent of 15*l.*, and that the said tenancy was determined by notice to quit given by them by the said Francis Wood Pritchard and Martha Pritchard (who are, or one of them is, become *entitled to the said tenement under the will of the said Robert Pritchard deceased), on the 29th day of September last; and that, on the 3rd day of October instant, they the said Francis Wood Pritchard and Martha Pritchard did serve on the said A. E. Darlington a notice in writing of their intention to apply to recover possession of the said tenement (a duplicate of which notice is hereunto annexed), by giving such notice to &c., at the dwelling-house of the said A. E. Darlington, and reading over and explaining the same &c.; and that, notwithstanding the said notice, the said A. E. Darlington hath refused to deliver up possession of the said tenement, and still detains the same.

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“ F. W. PRITCHARD.

“ Taken at Whitechurch, in the said county of Salop, the 16th day of October, 1840, before us

“ R. C. HILL,

“ W. H. POOLE.”

The defendant Francis Wood Pritchard alone appeared before the magistrates in support of the complaint. The plaintiff attended

may be), on the day of , and which tenement is now held over and detained from the said , be given to (the owner or agent), on or before the expiration of seven clear days from the service of this notice. I, , shall on next, the day of , at of the clock of the same day, at , apply to her Majesty's justices of the peace, acting for the district of , (being the district, division, or place in which the

said tenement, or any part thereof, is situate), in Petty Sessions assembled, to issue their warrant, directing the constables of the said district to enter and take possession of the said tenement, and to eject any person therefrom.

“ Dated this .

“ (Signed) .

“ (Owner or Agent.)

“ To Mr. .”

with his attorney, and it was contended on his behalf, that a new tenancy was created by the agreement with Mrs. Pritchard in March, 1836, which would not expire until Lady Day, 1841. The magistrates, however, were of opinion that the tenancy had expired under the notice to quit at Michaelmas, 1840, and granted a warrant (which had been since lost). Under the warrant possession was taken on the 9th of November; and the plaintiff's goods were removed from the premises. The key of the house was taken to Mrs. Pritchard's, by the officer, and laid down on the table in her presence. She was proved to have been frequently afterwards on the premises, which had been turned into a shop, with the names "Pritchard & Son" placed over the door.

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It was insisted on the part of Mrs. Pritchard, that the plaintiff ought to be nonsuited, inasmuch as there was no evidence to connect her with the trespass: and that at any rate the action against her should have been in case and not trespass, as the other defendant, at the time of applying for the warrant, had a right to the possession of the premises, and she was justified as his servant; or, if the application to the magistrates was improperly made, then they had no jurisdiction to grant the warrant (1). The Judge overruled the objections; and the plaintiff recovered a verdict for 90*l*.

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Channell, Serjt., (on Saturday, the 5th of November,) moved for a rule to enter a nonsuit or for a new trial, on the grounds taken at the trial; and also to arrest the judgment upon the ground that the plea stated that the defendant, F. W. Pritchard, was the owner, and entitled to the possession of the premises, and that the defendant Martha, had acted as his servant and by his command, and that this was admitted by the replication, wherein the plaintiff relied upon the estoppel only.

Cur. adv. vult.

TINDAL, Ch. J. now said:

We have looked at the pleadings in this case, and at the notes of the evidence of my brother *ERSKINE*. The rule was moved for upon two grounds: first, to enter a nonsuit (as to which no distinct leave was reserved), or for a new trial; secondly, in arrest of judgment.

The action is in trespass, and is brought against two defendants,

(1) See 1 & 2 Vict. c. 74, s. 6, *post*, p. 661, in the judgment.

DARLINGTON ^c Martha and Francis Wood Pritchard. Besides a plea of not guilty by the defendant Martha alone, the two defendants pleaded jointly a justification that Francis Wood Pritchard acted as owner, and Pritchard. Martha as his *servant and by his command. The plaintiff thereupon entered a *nolle prosequi* as to the defendant Francis Wood Pritchard; and, as to the other defendant, replied an estoppel by reason of a demise by her to the plaintiff, as tenant from year to year, which was still continuing. This demise is pleaded as an estoppel, because on the face of the pleadings no interest could pass under it, if the fee was in the other defendant, F. W. P. The jury having found a verdict for the plaintiff, the first question is, whether the evidence, as it appears on the notes of the learned Judge, is sufficient to show that such verdict was proper. And upon a careful consideration of the evidence we see no reason to disturb the verdict. It appears that the defendant Martha had, jointly with her son, given the plaintiff notice to quit, and also a notice that they intended to apply to the magistrates under the statute 1 & 2 Vict. c. 74; and that her son afterwards signed a complaint, "on behalf of himself and Martha Pritchard," in order to procure the warrant from the magistrates under that statute. This, we think, was evidence of assent and of an authority, on the part of the mother. There was also evidence to show that she was treated, and that she acted, as owner of the premises; as we find the key of the house was delivered to her. On the first point, therefore, we are of opinion that there was sufficient evidence to show that the defendant, Martha, had authorised and assented to the application by her son. But then it is said that the action is misconceived, and that it should have been in case, and not in trespass, inasmuch as the application to the magistrates being improper, they had no jurisdiction to grant the warrant. The third section of the Act 1 & 2 Vict. c. 74, however, expressly declares, "that, in every case in which the person to whom any such warrant shall be granted had not, at the time of granting the same, lawful right to the possession of the premises, the obtaining of any such warrant *as aforesaid shall be deemed a trespass (1) by

[*794]
 (1) It can hardly have been intended to give to a party, upon whose house or land no entry has been made, a formed action of trespass. The word "trespass" appears to be used in this statute in the more extended sense of a tort or wrong, every tort being in strictness a trespass, whether it be

punishable in an action *de transgression* in *casu proviso*, or in an action *de transgression* in *consimili casu*, or *super casum*. It may be observed that the statute is not very carefully worded. as in speaking of a tenancy from year to year, the term used is, the popular expression, "a tenancy at will."

him against the tenant or occupier of the premises, although no entry shall be made by virtue of the warrant." And in sect. 6 a distinction is expressly taken between case and trespass: for, it enacts "that, where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of the premises, or of the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this Act; but the party aggrieved may, if he think fit, bring an action on the case for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid, and may recover full satisfaction for such special damage, with costs of suit." We therefore think the statute clearly intended that a party who even obtains a warrant improperly should be considered a trespasser; and still more so, where, as in this case, the warrant has been put into execution.

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The only remaining point is as to the arrest of judgment. The argument in support of this is, that the second plea contains an allegation that the defendant, Francis Wood Pritchard, was the legal owner and entitled to the possession, and that the other defendant, Martha, as his servant and by his command, committed the trespasses complained of, and that this is not denied by the replication. It is true, it is not denied: but the *replication sets up an estoppel as to Martha by reason of the demise made by her to the plaintiff; and the very notion of an estoppel is, that it admits the facts against the allegation of which the estoppel is pleaded, *quatenus*—but to a certain extent only. It amounts to saying—such is your plea, but you are estopped by law from setting it up. The estoppel, therefore, cannot be relied upon as an admission of facts, so as to be taken advantage of in the cause. We think, therefore, there ought to be no rule.

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Rule refused.

1842.
Nov. 9.

[801]

AVELINE AND ANOTHER *v.* WHISSON.

(4 Man. & G. 801—804; S. C. 12 L. J. C. P. 58.)

To a declaration in covenant upon an indenture of lease, by the lessor against the assignee of the lessee, a plea that the indenture was not signed by the plaintiff, or by any agent authorised in writing, is bad.

COVENANT. The declaration stated that, heretofore, to wit, on the 26th day of July, A.D. 1819, by an indenture made between certain parties since deceased and the plaintiffs, of the one part, and one Richard Martin of the other part, (*profert* of the counter-part of the indenture, sealed with the seal of the said R. M.), the plaintiffs and the said other parties demised unto the said R. M., his executors, &c., a certain piece of ground with the messuage, &c., thereupon erected, &c. And the said R. M. did, in and by the said indenture, for himself and his heirs, &c., covenant with the said other parties and the plaintiffs, their executors, &c., (amongst other things), that he the said R. M., his executors, &c., should and would at all times, &c., well and sufficiently repair the premises by the said indenture demised, and yield them up in good and sufficient repair at the end of the term, &c. The declaration then stated that R. M. entered, and that afterwards, on the 1st January, 1838, his estate and interest vested in the defendant by assignment; that the defendant entered and continued possessed thereof, until the 29th of September, 1841, when the said demise ended and determined. Breach: that the defendant did not well and sufficiently repair *the premises during the term, or yield them up in repair at the said end and expiration thereof.

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Third plea; that the indenture in the declaration mentioned was not signed by the said parties deceased and the plaintiffs, or by any agent or agents of the said parties deceased and the plaintiffs, thereunto lawfully authorised by writing; nor was any lease of the said premises so by the said indenture alleged to have been granted, demised, &c., put in writing and signed by the said parties deceased and the plaintiffs, or any agent or agents of the said parties deceased and the plaintiffs, thereunto lawfully authorised by writing. Verification.

Demurrer; assigning for causes that the defendant had not, by his said third plea, either confessed and avoided, or traversed any matter of fact alleged in the declaration, and had not attempted to put in issue any matter of fact alleged by the plaintiffs, but had

introduced and attempted to put in issue matters of fact not alleged, or necessary to be alleged. And that the said plea was no answer to the declaration, but was evasive and argumentative; and also that the defendant by his said plea, denied and attempted to put in issue the signing of the indenture in the declaration mentioned by the said parties deceased and the said plaintiffs, or by any agent duly authorised by the said parties, but did not put in issue, or attempt to put in issue, the due execution of the said indenture by the said parties, by sealing and delivering the same; and that the issue attempted to be raised by the said plea, was utterly immaterial and incompetent to decide the question between the plaintiffs and the defendant; and also that the defendant, by his said plea, had attempted argumentatively and vaguely to put in issue the consideration for the execution by the said R. M., of the counterpart of the said indenture in the declaration mentioned; and also that the said third plea concludes with a verification, *whereas if it amounts to any thing it amounts to a traverse, and ought to have concluded to the country; &c. Joinder in demurrer (1).

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Talfourd, Serjt. in support of the demurrer :

The plea attempts to set up a defence under the Statute of Frauds; but that statute does not apply to this case, the lease being under seal. The plea is bad in form and substance. In form, it is a mere argumentative traverse of the demise. In substance it is bad, as the defendant by admitting that the

(1) The following points were marked for argument: on the part of the plaintiff:

“First, that it is no defence to an action on a counterpart lease against a lessee or his assigns, that the indenture was not executed by the lessor.

“Secondly, that even supposing it to be a defence during the continuance of the demise, it ceases to be so when the term has expired, and the full benefit of it has been enjoyed by the lessee or his assigns.

“Thirdly, that if the defence were substantially good, it is badly and inartificially pleaded, for the reasons stated in the demurrer.”

On the part of the defendant it was said, that “in addition to arguing that the plea was good in form, on the

authority of *Maggs v. Ames*, 1 Moo. & P. 294; and, in substance, on the authority of *Cardwell v. Lucas*, 46 R. R. 509 (2 M. & W. 111); and other cases (see *Berkeley v. Hardy*, 29 R. R. 261 (5 B. & C. 355)); it will also be contended:

“First, that the declaration stating no term, an estate for life must be presumed, which would not pass, except by feoffment or conveyance under the Statute of Uses.

“Secondly, that no term within the statute of 32 Hen. VIII. c. 34, is shown to have been granted, and therefore no cause of action is disclosed against the defendant as assignee of a term either under that Act, or at common law.”

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counterpart was under the seal of his assignor, is estopped from denying the execution of the original deed (1).

(MAULE, J.: Should not the estoppel be pleaded?)

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That is not necessary where the estoppel appears upon the pleadings. An assignee of a lease by indenture is estopped by the deed which estops his assignor: *Taylor v. Needham* (2); and here *the assignor Martin would have been clearly estopped.

(MAULE, J.: Can the other side contend that a deed requires signature? This is not like a lease by parol.)

Channell, Serjt., who was to have supported the plea, after referring to 1 Wms. Saund. 291, n. (1), admitted that an allegation of a demise being by indenture, imports that the demise is by an instrument in writing and under seal.

Per CURIAM :

Judgment for the plaintiff.

1842.
Nov. 22.
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ARNOLD v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF POOLE (3).

(4 Man. & G. 860—898; S. C. 5 Scott, N. R. 741; 12 L. J. C. P. 97; 2 Dowl. N. S. 574; 7 Jur. 653.)

No municipal corporation (but that of London) can appoint an attorney except under the corporate seal.

Therefore an attorney who has been appointed by the mayor and town council to conduct suits, but not under seal, cannot recover his costs against the corporation.

But if he has claims in respect of costs against a corporation, some of which he can enforce, and some of which he cannot, by reason of the want of a valid appointment, and money is paid to him generally on account, he may appropriate such payments to the latter claims.

DEBT. The first count of the declaration was for 3,811*l.* 2*s.*, for work, labour, &c. by the plaintiff, done and performed as the attorney and solicitor of the defendants. The second was for 3,000*l.*, for money paid. The third was for 100*l.* claimed to be due to the plaintiff as salary as town clerk, and for services as such town clerk performed by him upon the employment and at the

(1) As to the popular distinction between an original deed and a counterpart, *vide Hall v. Ball*, 60 R. R. 498 (3 Man. & G. 242).

(2) 11 R. R. 572 (2 Taunt. 278).

(3) Foll. *Ecclesiastical Commissioners v. Merral* (1869) L. R. 4 Ex. 162, 188. 38 L. J. Ex. 93; cited in *Lusford v. Billericay Rural Council* [1903] 1 K. B. 772, 786.—A. C.

*request of the defendants. The fourth was 3,811*l.* 2*s.*, upon an account stated.

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The defendants pleaded, first, as to all except 100*l.*, never indebted; secondly, no signed bill delivered before action brought; thirdly, as to all except 100*l.*, payment; fourthly, as to 500*l.*, parcel, &c., except the sum of 100*l.*, a set-off; fifthly, as to 100*l.*, payment into Court.

The cause came on for trial before Coleridge, J., at the Dorchester Summer Assizes in 1840, when a verdict was entered for the plaintiff by consent, damages 500*l.*, debt 10,622*l.* 4*s.*, costs 40*s.*, subject to the award of a barrister, to whom the cause and all matters in difference comprised in the bills of costs were referred, and who was to direct whether the verdict so entered for the plaintiff should stand; and if to stand, for what amount of damages, or whether a verdict should be entered for the defendant, or a nonsuit be entered: and it was ordered that the said arbitrator, if he thought fit, was to state facts and make an interlocutory award or awards, at the request of either party, for the purpose of taking the opinion of the Court on any point, and to have the same powers as a Judge at Nisi Prius: the parties to the said cause thereby agreeing to be bound and concluded by such award as the arbitrator should make of and concerning the premises referred to him, &c.

On the 7th June, 1841, the arbitrator made an award, which, after reciting the order of Nisi Prius, (which had been made a rule of Court,) proceeded as follows:

“I do award and order, that the verdict found for the plaintiff be set aside, and instead thereof I do direct, as to the issue joined upon the plea of the defendants by them first pleaded, that a verdict be entered upon that issue for the plaintiff, damages 1*s.*, debt 718*l.* 9*s.* 7*d.*, subject to the opinion of the Court upon the points hereinafter reserved; the amount of debt, for which it *is so entered, to be increased or reduced by such sum or sums as are hereinafter specified: and, as to the issue joined upon the replication of the plaintiff to the plea of the defendants by them secondly pleaded, I do direct a verdict to be entered for the plaintiff: and, as to the issues severally joined upon the replication of the plaintiff to the pleas of the defendants by them thirdly and fourthly pleaded, I do direct a verdict to be entered for the plaintiff upon the same: and I hereby state the following facts to be submitted for the opinion of the Court:

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“The action was brought by the plaintiff, an attorney, and town clerk and clerk of the peace of the borough of Poole, to recover the amount of several bills. The action was commenced in June, 1840. The claim of the plaintiff consisted of charges and disbursements for business done by him as an attorney in divers suits and other matters, at various times, from the year 1836 until the year 1840, and also for business done by, and fees and salary due to, him as such town clerk and clerk of the peace. The plaintiff was appointed town clerk and clerk of the peace under the seal of the corporate body in January, 1836, at an annual salary of 100*l.* for his ordinary business; and was town clerk of the borough during all the time when the business for which the action was brought was done.

“The borough of Poole is an ancient body corporate, and one of the boroughs regulated by and included in Schedule A. of the statute 5 & 6 Will. IV. c. 76.

“The charges were contained in ten separate bills, and were for business done and disbursements made under the following circumstances:

“The bill No. 1 was headed ‘Bill of costs on opposing a bill in both houses of Parliament for setting aside the municipal election of Poole, on the alleged grounds of fraud, and disbursements in relation thereto.’ The *amount of this bill was 1,591*l.* 1*s.* 4*d.*; and it contained no taxable items. No signed bill containing the particulars of this demand had been delivered to the defendants before the commencement of the action.

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“In the year 1836, a select committee of the House of Commons was appointed, on the petition of certain inhabitants of Poole, to inquire into the circumstances relating to the then last municipal election of councillors and other corporate officers of the borough of Poole. And afterwards, on the report of the said committee, a bill was introduced into the House of Commons for the purpose of avoiding the said election on the ground of fraud and illegal practices. This bill passed the House of Commons, and was subsequently rejected in the House of Lords. The charges contained in No. 1, were for disbursements made and business done by the plaintiff, in opposing the motion for the appointment of the said select committee, and the bill so introduced into the House of Commons. The plaintiff had received no authority under the seal of the corporation to take any proceedings in the above matter. The propriety of such proceedings had not been proposed or

considered at any regular meeting of the town council, nor had any meeting of the town council been summoned for that purpose. There was no memorandum or resolution in the minute book of the town council authorising any of these proceedings. The plaintiff had received orders from the mayor for the time being, and from other members of the town council, to take all necessary steps to oppose the measures in Parliament. Several meetings were held at the town clerk's office, where the mayor and the minority in number of the town council attended and instructed the plaintiff to oppose the said bill in Parliament: but the members of the town council generally had not been summoned to *attend such meeting, nor did they attend. The members summoned were those only who were known to be favourable to an opposition to the bill. The charges were for business done between February and the 2nd of August, 1836.

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“On the 3rd of August, 1836, the following resolutions were passed at a quarterly meeting of the town council, and entered in the minute book :

“Resolved unanimously, that the thanks of this meeting be presented to the Right Hon. Lord Lyndhurst, Lord Redesdale, and the other noble peers, for their powerful efforts in rejecting the unconstitutional bill attempted to be passed for the destruction of this council.

“Resolved unanimously, that the thanks of this meeting be presented to the Right Hon. C. W. Wynn, the Hon. Mr. Law, Mr. Serjeant Goulburn, Mr. Serjeant Jackson, Horace Twiss, Esq., W. Winthrop Praed, Esq., — Trevor, Esq., and the other members of the honourable House of Commons, who so nobly opposed the unconstitutional bill, brought in and supported through the House of Commons by Mr. Poulter of Shaftesbury, for the destruction of this council.

“Resolved unanimously, that the mayor be requested to forward a copy of the above resolutions to each of the noble Lords and honourable members, under the seal of this council.’

“The bill No. 2 was headed ‘Bill of costs incurred in opposing a rule for a *mandamus* as to the inspection of voting papers.’ The amount of these charges was 141*l.* 11*s.* 10*d.*

“After the annual municipal election in 1835, the voting papers for that year were deposited with the plaintiff as town clerk. A complaint was made as to the mode in which the town clerk allowed the burgesses to inspect the voting papers, and a rule was obtained

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in the Court of Queen's Bench, calling on the plaintiff to *show cause why a *mandamus* should not issue commanding him to permit certain burgesses to inspect the voting papers. The rule was subsequently discharged by arrangement (1). The plaintiff had received no authority under the seal of the corporation to take any steps in the matter, nor was there any entry or resolution in the minute book of the town council directing the plaintiff to take any proceedings. He had received orders from the then mayor to oppose the rule, and the costs were incurred in opposing it. The business was done between January and May, 1836.

“The following resolutions and orders were passed at meetings, and entered in the minute book, of the town council:

“‘29th March, 1837. Resolved unanimously, that a finance committee be appointed for the purpose of examining all accounts and claims upon the council, and reporting thereon.’

“‘6th February, 1839. Resolved, that the report of the finance committee, as now read, be received and adopted.’

“‘1st May, 1839. At a quarterly meeting of the council of this borough, it is ordered, that the bills of the town clerk, amounting to 1,000*l.* 13*s.* 5*d.*, be taxed.

“‘It is ordered, that the sum of 500*l.* be paid to the town clerk by the treasurer on account of his bill delivered.’

“‘7th August, 1839. Resolved, that the sum of 150*l.* on account of the cheque of 500*l.*, dated the 1st May last, be paid by the treasurer to the town clerk.’

“The report of the finance committee, above referred to, was as follows:

[*866] “‘28th January, 1839. The committee having examined the outstanding accounts due by the council for *the year ending 9th of November, 1838, finding the following orders on the treasurer outstanding, viz.

“‘The clerk, for sundry law bills, 1,000*l.* 13*s.* 5*d.*

“‘The committee offer no observations on the bills delivered in by the town clerk, and recommend the same to the consideration of the council.’

“The above bill of 141*l.* 11*s.* 10*d.* was included in the bills amounting to 1,000*l.* 13*s.* 5*d.* mentioned in the above report, and had been duly delivered to the defendants, signed by the plaintiff as required by the statute, on or before the 28th of January, 1839. The other bills delivered, to which the above report refers, were

(1) See *Rex v. Arnold*, 4 Ad. & El. 657; 6 Nev. & Man. 152.

bills Nos. 3, 4, 5, 6, and 7, hereinafter mentioned. An order for the payment of 500*l.*, on account of the bills so delivered, was given to the plaintiff; and at the time of the bringing of this action 350*l.* out of the 500*l.* so ordered had been paid to the plaintiff by the treasurer of the borough.

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“The bill No. 3 was headed ‘Costs and expenses incurred in the matter of the municipal charities in the borough of Poole.’ A signed bill of these costs had been duly delivered to the defendants, on or before the 28th of January, 1839.

“An application had been made to the Court of Chancery, on the petition of certain councillors of the borough of Poole, to appoint trustees of the corporation charity estates; and a counter-petition had been presented by three councillors of the borough, praying that they might be admitted to take part in the proceedings, which had been referred to a Master. The whole amount of the bill of costs of the counter-petitioners was 18*l.* 6*s.* An order of the Court of Chancery was made, whereby it was ordered that the costs both of the petitioners and counter-petitioners should be taxed and paid out of the charity funds. The taxed costs of the counter-petitioners amounted to 101*l.* 18*s.* 11*d.*, of which *the plaintiff had received 55*l.* before the commencement of this action. The claim in this action was for 82*l.* 7*s.* 1*d.*, the residue of the above bill of costs. The business was done between September, 1836, and January, 1837.

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“There was no authority given to the plaintiff under the seal of the corporation: but the following resolution was passed at a meeting, and entered in the minute book, of the town council:

“‘7th September, 1836. Resolved unanimously, that Mr. Thomas Arnold, the town clerk of this borough, be authorised to take such steps as may be advised by counsel with reference to a petition to the Lord Chancellor by George Lockyer Parrott and William Green, two of the members of this council, for the appointment of trustees of several of the charities in Poole, without previously conferring with this council thereon; and that the town clerk be also authorised to take such other steps as may be advised for continuing the appointment of trustees of the said charities in the council of this borough, in conformity with the intention of the several donors thereof.

“‘Resolved unanimously, that the petition now produced by the town clerk, and read to this meeting, be adopted on the part of this council, and the common seal of the borough affixed thereto.’

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“The petition referred to in the above last-mentioned resolution. was the counter-petition to which the bill of costs refers.

“The bill No. 4 was a bill of costs incurred in a suit in Chancery between *The Attorney-General* at the relation of the Honourable W. F. S. Ponsonby and others, and *The Mayor, Aldermen, and Burgesses of the Borough of Poole, Robert Henning Parr, and Thomas Arnold.*

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“The object of the suit was to call in question the right of the said Robert Henning Parr to certain compensation *which had been granted him on his removal from certain borough offices, and to cancel a bond given by the corporation of Poole as a security for such compensation, on the ground that the compensation was illegal, and the bond fraudulent and void. A charge of fraud was made in the information filed in this suit against the corporation. The amount of the claim was 347*l.* 19*s.* 3*d.*, and was for business done between the 18th of November, 1837, and November, 1838. A signed bill of these costs had been duly delivered before the commencement of the action.

“The bill No. 8 was a bill of costs in the last-mentioned suit for business done from November, 1838, to September, 1839. A signed bill of these costs had been duly delivered before the commencement of this action. The amount of this bill was 454*l.* 6*s.* 6*d.*

“The plaintiff had received no authority under the seal of the corporation to take the proceedings in this suit; but the following resolutions were passed at meetings, and entered in the minute book of the town council:

“‘17th November, 1837. The mayor and town clerk having been served with a Chancery *subpœna* commanding them within eight days to appear to an information filed by her Majesty’s *Attorney-General* at the relation of the Honourable W. F. S. Ponsonby and others. Resolved unanimously, that the town clerk be authorised to enter an appearance for the council and himself to such information, and to obtain an office-copy thereof; and he is also authorised to retain counsel, and take such steps as may be necessary in defence of this council and himself, and for answering such information.’

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“‘7th February, 1838. Resolved, that the instructions given by the mayor to the town clerk on an appeal to the Lord Chancellor against the judgment of the MASTER OF THE ROLLS in the case of *The Attorney-General* *on the relation of the Hon. W. F. S. Ponsonby and others against *The Corporation of Poole*, be confirmed.’

“ ‘24th November, 1838. Resolved, that the town clerk do suspend proceedings in the cause of *The Attorney-General v. The Corporation of Poole*, till further instructed by the council: and that his bills in the above suit be made up to this date, and referred to the finance committee for their report at the next meeting of this council.’

“ ‘6th February, 1839. Resolved, that the report of the finance committee, as now read, be received and adopted.

“ ‘Resolved, that the town clerk be authorised to prepare the necessary instructions for answering, by the corporation and himself, the information, as amended, filed against the corporation by the *Attorney-General* on the relation of the Hon. W. F. S. Ponsonby and others.’

“ ‘22nd February, 1839. Resolved, that the town clerk be directed to forward the several minutes and answers prepared this day to the several queries of the amended information filed by the *Attorney-General*, on the relation of the Hon. W. F. S. Ponsonby against this corporation, with such other instructions and documents referred to as he shall consider to apply to the effectually answering the said bill, for counsel to draw the answer in the usual way.

“ ‘Resolved, that the sum of 100*l.* be voted to the town clerk to enable him to meet the expenses to be incurred in preparing the above answer, and defending the said information.’

“ ‘1st April, 1839. Resolved, that the draft answer of the corporation, as now read to the council, be approved and filed as the answer of the corporation to the original and amended information filed against them by the *Attorney-General*, at the relation of the Hon. W. F. S. Ponsonby, and others; and that the mayor be authorised *to affix the seal of the corporation of the said borough thereto on being engrossed.

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“ ‘10th September, 1839. The draft of the further answer, and of the answer to the supplemental bill of *The Attorney-General v. This Corporation*, was read and explained at this meeting, preparatory to the same being engrossed.

“ ‘6th May, 1840. Resolved, that the report of the finance committee now read be received.’

“ ‘The report referred to was as follows :

“ ‘5th May, 1840. The committee also beg to report that the following bills have been delivered in by the town clerk, amounting to the sum of 1,547*l.* 5*s.* 6*d.*; and your committee, finding that they

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have been frequently laid before the council, recommend that some decisive steps be taken for disbursing the same.'

"Amongst the bills so referred to were the above-mentioned bills (No. 4) of 347*l.* 19*s.* 3*d.* and (No. 8) of 454*l.* 6*s.* 6*d.* The 100*l.* voted to the plaintiff by the above resolution was paid to him. The above information had been filed in the Court of the Master of the Rolls; and an appeal was had from his judgment thereon to the Lord Chancellor. The suit is not determined, but is still pending, on appeal to the House of Lords. The plaintiff is still the solicitor in the suit. It was not proved that he had given any notice to the defendants of an intention not to go on with the suit.

"The bill No. 5 was a bill of costs in defending an action at law brought in December, 1837, by *Robert Henning Parr* against *The Corporation of Poole*, to recover an instalment and interest due on a bond given by the corporation to the said Robert Henning Parr, to secure certain compensation granted to him on his removal from certain borough offices. The attorney on the record on behalf of the corporation was Mr. Weller, who was the town agent of Mr. Arnold, the town clerk. The *plaintiff had received no authority under the seal of the corporation to defend the action; but the following resolutions were passed at a meeting and entered in the minute book of the town council.

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" '30th December, 1837. The mayor having been served with a writ issued out of her Majesty's Court of Common Pleas by *R. H. Parr* against *The Mayor, Aldermen and Burgesses of the Borough*, claiming the sum of 1,350*l.*, being the first instalment due to the said R. H. Parr, on a bond executed by the council, dated the 29th November, 1836, for compensation, with interest thereon, and the town clerk having entered an appearance for this council, at the request of the mayor—

" 'Resolved, that the same be hereby confirmed.'

"A signed bill of these costs was delivered in January, 1839, and was one of those included in the report of the finance committee of the 6th February, 1839. The amount was 65*l.* 8*s.* and was for business done between December, 1837, and March, 1838.

"The bills No. 6 and No. 9 were for business done at the Sessions. The bills No. 7 and No. 10 were for general business as town clerk. These bills Nos. 6, 7, 9 and 10, had been signed and duly delivered before the commencement of this action. The plaintiff had frequently received orders from the town council, by means of

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resolutions, to act as their attorney in taking proceedings to recover all arrears of rent, to obtain possession of corporation property, and the like; and the finance committee had often called the attention of the town council to the bills delivered in by the town clerk, and had reported that the town clerk had made considerable advances on account of the council.

“As to the bill, No. 1, I find, that upon the facts above stated, there was no sufficient evidence of a retainer of the plaintiff by the defendants, and of a right of action, so as to enable the plaintiff to maintain this action in respect thereof against them.

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“And, as to the bills, Nos. 2, 3, 4, 5 and 8, I find that the above facts do not furnish evidence of a retainer of the plaintiff by the defendants, and of a right of action in respect of the matters contained in the last-mentioned bills, so as to enable the plaintiff to maintain this action in respect of the same, or either of them, against the defendants.

“And as to the bills, Nos. 6, 7, 9 and 10, I find that, after allowing all just deductions and payments, there is due and owing from the defendants to the plaintiff in respect thereof the sum of 718*l.* 9*s.* 7*d.*, which sum of 718*l.* 9*s.* 7*d.* is the debt for which I have directed the verdict to be entered as above-mentioned.

“And as to the sum of 350*l.* paid to the plaintiff in pursuance of the resolution of the 1st of May, 1839, on account of the bills, Nos. 2, 3, 4, 5, 6 and 7, I find that the plaintiff applied part of that sum in satisfaction of the bills, Nos. 2, 3 and 6, amounting in the whole to 203*l.* 6*s.* 10*d.* and the residue of the said sum amounting to 66*l.* 13*s.* 2*d.*, in part satisfaction of the bill, No. 7: and I have, in estimating the debt, for which I have directed the verdict to be entered, so appropriated the said sum of 350*l.*

“And I do hereby submit the following questions for the opinion of the Court.

“First, whether the facts above stated furnish sufficient evidence of a retainer of the plaintiff to enable him to maintain this action in respect of the charges contained in the bill, No. 1, against the defendants.

“Secondly, whether in the absence of any authority under the seal of the corporation, the above facts furnish evidence of a valid contract or retainer binding the corporation, so as to enable the plaintiff to maintain this action for the whole or either of the bills, Nos. 2, 3, 4, 5 and 8, against the defendants.

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“Thirdly, whether the charges in the bills, Nos. 1, 2, 3, 4, 5

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and 8, were for matters concerning which the corporation could enter into a valid contract, or give a retainer binding the funds of the corporation, so as to enable the plaintiff to maintain this action in respect of such bills, or any of them, against the defendants.

“ ‘Fourthly, whether the plaintiff had any right of action against the defendants to recover the charges contained in the bills, Nos. 4 and 8, the suit to which they referred being undetermined.

“ ‘Fifthly, whether the plaintiff had a right to appropriate the payment of two sums, *videlicet*, of 141*l.* 11*s.* 10*d.* and of 82*l.* 7*s.* 1*d.*, part of the said sum of 350*l.*, to the bills No. 2 and No. 3 respectively.’

“ ‘If the Court shall be of opinion, that the facts above stated furnish sufficient evidence of a retainer of the plaintiff, and of a right of action, so as to enable him to maintain this action in respect of the charges contained in the bill, No. 1, against the defendants, and that the said bill was for matters concerning which the corporation could, by such retainer, bind the funds of the corporation, I direct the debt for which I have ordered the verdict to be entered to be increased by the amount of the said bill. No. 1.

“ ‘If the Court shall be of opinion, that the facts above stated, in the absence of any authority, given to the plaintiff under the seal of the corporation, to do the work and business contained in the bills, Nos. 2 and 3, do not furnish evidence of a retainer, or valid contract, binding the corporation, in relation to the matters contained in the said bills, or either of them, so as to enable the plaintiff to maintain this action, in respect of such matters, against the defendants, and the plaintiff had *no right to appropriate the several sums of 141*l.* 11*s.* 10*d.* and of 82*l.* 7*s.* 1*d.* to the payment of the same, or either of them, then I do direct the said sums of 141*l.* 11*s.* 10*d.* and 82*l.* 7*s.* 1*d.*, or such of them as the Court shall be of opinion the plaintiff had no right to appropriate, to be deducted from the debt for which I have directed the verdict to be entered.

“ ‘If the Court shall be of opinion, that, in the absence of any authority given to the plaintiff under the seal of the corporation to do the work contained in the bill, No. 5, the facts above stated furnish evidence of a retainer, or valid contract, binding the corporation, in relation to the matters contained in the said bill, and that the same was for matters concerning which the town

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council had power to make a valid contract, or to give a retainer binding the corporation, then I direct the debt for which I have ordered the verdict to be entered to be increased by the amount of the said last-mentioned bill.

“ If the Court shall be of opinion that the facts above stated, in the absence of any authority given to the plaintiff, under the seal of the corporation, to do the work contained in the bills, Nos. 4 and 8, furnish evidence of a retainer, or valid contract, binding the corporation, in relation to the matters contained in the said last-mentioned bills, or either of them, and that the same were for matters concerning which the town council had power to make a valid contract, or give a retainer, binding the corporation, and also that the plaintiff had a right of action to recover the same, or either of them, notwithstanding the suit to which they refer had not been determined, then I direct the debt for which I have ordered the verdict to be entered, to be increased by the amount of such bill or bills, deducting therefrom the sum of 100*l.* paid to the plaintiff in pursuance of *the resolution above-mentioned on account of the said bills.”

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The case was argued in last Easter Term.

Bompas, Serjt. (with whom was *Barstow*) for the plaintiff :

The principal question in this case is, whether or not a corporation can appoint an attorney to act for them otherwise than under their common seal. Secondly, it is a question, whether, under the circumstances disclosed in the award, there has not been substantially an appointment under seal. And, lastly, whether, supposing there was not a valid retainer of the plaintiff as to some of the services performed by him, he was at liberty to appropriate payments, that were made to him generally, to the costs of the proceedings in which he had not been properly retained.

With regard to the first question, it is to be observed, that no point can be made in favour of the defendants, grounded on any distinction between executory and executed contracts. The work has been *bonâ fide* done by the plaintiff; and in most of the instances he is shown to have been employed to do the particular work either by the mayor, as the head of the corporation, or by the body, pursuant to resolutions passed by them; and in all the cases the corporation recognised and sanctioned the employment. The question is, whether, under these circumstances, a narrow technical rule is to stand in the way of the plaintiff's right to

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recover for his services? The general rule undoubtedly is, that a corporation can only act by deed under their common seal⁽¹⁾. That rule however has been much broken in upon by modern authorities; and even in the older cases, at a time when the rule was more strictly adhered to, it was considered that a corporation might do certain acts *and make certain appointments, such as of a servant, cook, butler, &c., without deed: Bro. Abr. Corporations et Capacities, 47 (2), 49 (3), 50 (4), 56 (5); Com. Dig. *Franchises (F. 13); Vin. Abr., Corporations (K.); Bac. Abr. Corporations (E.) 3.

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(1) Bro. Abr. Corporations et Capacities, pl. 34.

(2) "Debt. TOWNSEND, J.: A dean and chapter may retain and assign a bailiff, receiver, or other servant without writing. BRIAN, Ch. J. of C. P., *contra*: and that he could not be a servant without writing, nor demand his salary without writing; but they may charge a man for his occupation without deed, as a guardian in socage, bailiff of the King, and receiver of his own head, and such like, and he was positive (precise) in this. 4 Hen. VII. 6."

(3) "TOWNSEND, J. C. P.: A corporation may have ploughmen and servants of husbandry, butlers, cooks, and such like, without retainer by deed; and a servant may justify by the command of a body politic without having a deed of command. BRIAN, Ch. J. C. P. *contra*: And that they can do nothing without writing. VAVISOURE, K. S.: In the time of Edw. IV., it was agreed that a corporation cannot assign auditors without writing. And BRIAN was of opinion, that a bailiff (ought) to be charged as here, by reason of his occupation. 4 Hen. VII. 17."

(4) "Trespass. The defendant said, that it was the freehold of the president and scholars of C., and he, as servant to them, and by their command, entered &c. *Keble*, Serjt.: He cannot be retained with the corporation without specialty; nor make a feoffment without specialty. HUSSEY, Ch. J. of K. B. (in the Year Book, '*Non, par Dieu*'). They cannot be disseisors without an agreement by

deed, nor enter on the land without a command given by deed. WOOD, K. S.: As to small things, there is no need for a writing; as for lighting candles, making hay or fire, nor for putting cattle out of their land. OXENBRIDGE apprehended to the contrary: for these things belong to a servant to do without command; but entering and such like ought to be by deed. And FAIRFAX, J. K. B., agreed as to small things; but that a corporation could not have a servant but by deed. And TREMAILE agreed with WOOD as to small things. Nevertheless, in the same place, the last folio in the same year, it was agreed that a corporation could not vest in them, or divest out of them, any freehold by any person without authority given by deed. Nevertheless several *contra* as to the small things above-mentioned, by reason of the usage and of the great trouble that it would be to the contrary; but not by the law: *ideo quere*. 7 Hen. VII. 9."

(5) "Debt upon arrears of account, by the mayor and commonalty of S. against the executors of T. P. their receiver; and they counted that auditors were assigned by the aforesaid mayor and commonalty." — "and by LITTLETON, The opinion of all the justices of both benches is, that an assignment of auditors by a corporation is good without deed; and the same of a justification by their command; and the same of a command by a convent, in the time of vacation, to saw their trees and other necessaries. 12 Edw. IV. 9, 10."

(TINDAL, Ch. J.: The principle to be collected from the old cases appears to be, that an appointment under seal was not necessary in the case of officers or servants required to perform acts of trifling import or of immediate necessity. If cattle were *damage feasant*, and it were necessary to appoint a bailiff under the corporate seal in order to distrain them, the cattle might escape while the deed was preparing.)

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It is submitted that cannot be the only reason; for in such a case the appointment might, if it were necessary, have been made out after the act was done, so long as it was in existence at the time of pleading. There may be many cases where the presence of an attorney at the time the act is done may be most important, and where there would be neither time nor opportunity to execute a deed for the purpose of retaining him. The only object for which a seal can be required is to testify the fact of the appointment—and in this case that has been done sufficiently by the resolutions of the body. A seal is by no means a protection against an improper appointment—for a seal may be affixed by some subordinate officer, without the assent of the body. In *Roe d. The Dean and Chapter of Rochester v. Pierce* (1) a notice to quit, given by a person acting as steward of a corporation, was held sufficient, without evidence that he had an authority under seal from the corporation for that purpose. A corporation, it is true, can only appear by attorney: case of *Sutton's Hospital* (2); but in London an attorney for the corporation *is appointed every year in open Court without seal.

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(TINDAL, Ch. J.: That is matter of record: *Mayor of Thetford's* case (3).)

It has been held that a stranger may receive a deed to the use of a corporation, without a letter of attorney from them to receive it: *Cooper v. Gooderich* (4). Formerly it was thought that a corporation could not be sued for a tort; but that doctrine has been overruled: *Yarborough v. The Bank of England* (5); and it has been decided that tort will lie against a corporation even for the act of their agent, though not appointed under seal: *Smith v. The Birmingham*

(1) 11 R. R. 673 (2 Camp. 96).

(2) 10 Co. Rep. 22, 32 b. See also Bro. Abr. Corporations et Capacities, pl. 28 (citing 19 Hen. VI. 80); Co. Litt. 66 b; Com. Dig. Pleader (2 B. 2); and see *infra*, p. 693, n. (2).

(3) 1 Salk. 192; 3 Salk. 103; Holt, 171; *S. C. per nom. Rex v. Chalice, Mayor of Thetford*, 2 Ld. Ray. 848; *Vide infra*, pp. 680, 692.

(4) Cro. Eliz. 862.

(5) 14 R. R. 272 (16 East, 6).

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and *Staffordshire Gas Light Company* (1). It has also been held that a corporation aggregate, strictly partaking of the corporate character, may sue in assumpsit upon an executed consideration: *The Barber Surgeons v. Pelson* (2), or in debt for use and occupation: *The Dean and Chapter of Rochester v. Pierce* (3); *The Mayor and Burgesses of Stafford v. Till* (4); and if such actions are maintainable, the remedy must be mutual (5). In *The East London Waterworks Company v. Bailey* (6) it was held that assumpsit would not lie by a corporation upon an executory contract not under seal. The applicability of that doctrine to a manufacturing or trading corporation was, however, questioned in *Dunstan v. The Imperial Gas Light Company* (7); and it was at length established *that it did not apply in such cases: *Beverley v. The Lincoln Gas Light and Coke Company* (8); *Church v. The Imperial Gas Light and Coke Company* (9).

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The Mayor of Ludlow v. Charlton (10) will probably be relied upon by the other side, where it was held that a municipal corporation cannot enter into a contract to pay a sum of money out of the corporate funds for the making of improvements within the borough, except under the common seal. But the contract in that case was one relating to land, and involved a specific outlay of the corporation property. In *Stevenson v. The Corporation of Berwick* (11), which, like the present case, was an action for work and labour by an attorney against a corporation, the objection was not taken. Suppose an attorney, not appointed by deed, had recovered judgment at the suit of the corporation, and had received the fruits of such judgment, would the fact of his not having been appointed by deed have protected him from liability to be sued for money had and received?

By sect. 76 of the Municipal Corporations Act (5 & 6 Will. IV. c. 76) (12) the town council are to appoint a certain number of their own body a watch committee; and such committee are to appoint

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| (1) 40 R. R. 358 (1 Ad. & El. 526; 463; 4 C. P. 617; 38 L. J. C. P. 338.] | (7) 37 R. R. 352 (3 B. & Ad. 125). |
| 3 Nev. & M. 771). | (8) 45 R. R. 626 (6 Ad. & El. 829; |
| (2) 2 Lev. 252. | 2 Nev. & P. 283). |
| (3) 1 Camp. 466. | (9) 45 R. R. 638 (6 Ad. & El. 846; |
| (4) 4 Bing. 75; 12 Moo. 260. | 3 Nev. & P. 35). |
| (5) See the judgment in <i>Beverley v. The Lincoln Gas Light and Coke Company</i> , 45 R. R. 626 (6 Ad. & El. 829, 841; 2 Nev. & P. 283, 291). | (10) 55 R. R. 794 (6 M. & W. 815). |
| (6) 4 Bing. 283; 12 Moo. 532. | (11) 55 R. R. 230 (1 Q. B. 154; |
| [Overruled <i>South of Ireland Colliery Co. v. Waddle</i> (1868) L. R. 3 C. P. | 4 P. & D. 546). |
| | (12) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 190. |

constables for the borough. It never could have been intended that such appointments were necessarily to be under the seal of the corporation. If an action were brought against such a constable for an act done by him in the execution of his duty, might not the corporation employ an attorney to defend him; and must the retainer in that case be under seal?

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(ERSKINE, J. : The question would be, could the attorney maintain an action against the corporation unless he were appointed by deed; and that is very like the present *question.

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CRESSWELL, J. : By sections 95 and 96 the council are empowered to renew and grant leases; it could hardly be contended that they could do so except under seal.)

That would stand upon a very different footing. There are some instances in which perhaps it might be required that the council should contract under seal; as, for example, where they contract for committing prisoners to the gaol of another borough, which by sect. 115 they are empowered to do "in the name of the body corporate." By sect. 58 (1) the council have power to appoint a town clerk, treasurer, and other officers: the town clerk may be, and probably would be, an attorney, but the Act does not require the appointment to be under seal.

(TINDAL, Ch. J. : An attorney acting in any individual suit would hardly be considered as an officer of the corporation.)

The town council would appear to have the right of making any appointments necessary to carry out the purposes of this Act.

(COLTMAN, J. : Is there any part of the Act by which a power is given to any person or persons to affix the corporate seal?)

There is no clause to that effect.

With regard to the particular bills in question. As to No. 1 (2) it must be admitted that there was no retainer by the corporation in respect of the business included therein, and no subsequent recognition by them of the employment of the plaintiff.

(TINDAL, Ch. J. : As to that bill, the plaintiff must look for payment to those who employed him.)

(1) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 17. (2) *Supra*, p. 666.

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The bill No. 2 (1) relates to the costs of opposing a rule for a *mandamus*. It appears that a question had arisen as to the right of the burgesses to inspect the voting papers; the plaintiff, as town clerk, had refused to allow the inspection; a rule *nisi* had been obtained for a *mandamus* directing the plaintiff to allow such inspection, *and this rule was opposed under the direction of the mayor, and the opposition was afterwards recognised by the town council: the argument on that case is reported in *Rex v. Arnold* (2).

(COLTMAN, J. : This bill is for business done in his office of town clerk.)

No. 3 (3) refers to costs incurred relating to the municipal charities of the borough. A petition having been presented to the Lord Chancellor, as to the appointment of trustees, under sect. 71 of the 5 & 6 Will. IV. c. 76, a counter-petition was presented, the management of which was entrusted to the plaintiff by a resolution of the town council; and this counter-petition it appears was under seal.

(COLTMAN, J. : It does not expressly appear from the award that the counter-petition was under seal; but only that a resolution was passed that the common seal should be affixed thereto.)

It may fairly be inferred that the seal was affixed, in pursuance of the resolution; and it is clear that it was presented and proceeded in, by the authority of the corporation. This would amount, at any rate, to a recognition, by the town council, of the employment of the plaintiff. Besides, he would, in this instance, appear as their attorney on record; and the case would therefore fall within the principle of *The Mayor of Thetford's* case (4) before mentioned, where it was laid down that a mayor and corporation may do an act by record, though it be not under seal; and they may appoint an attorney in the same way; as the city of London does every year. It may be said, that is by custom; but it shows that *such a custom in a corporation is good.

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(1) *Supra*, p. 667.

(2) 4 Ad. & El. 657; 6 Nev. & M. 152.

(3) *Supra*, p. 669.

(4) In that case the return to a *mandamus* directed to the corporation of Thetford, was objected to, as not being under their common seal, or

under the hand of the mayor. Precedents having been searched for, many such returns were found, and the COURT held the return was sufficient, the act being on record. *Vide post*, p. 692, in the judgment of the COURT.

(TINDAL, Ch. J.: I think you can hardly derive any argument from that. It is an isolated case. It has been done from the earliest times, and is a solemn proceeding in the Courts at Westminster. The lord mayor comes to the Bar of this Court attended by the late lord mayor, several members of the corporation, and the Recorder, as the mouthpiece of the corporation; the appointment of the attorney is read and is entered on record on the prayer of the Recorder (1). This proceeding has been sanctioned by ancient custom. It may rather be said: *Exceptio probat regulam*.

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CRESSWELL, J.: Could any other corporation come to the Court and ask them to do the same thing?

COLTMAN, J.: In *The Mayor of Thetford's* case the question was not with regard to the corporation of London, but to another corporation.)

The case of London was there referred to as affording a good argument applicable to other corporations, that they might do certain acts by record. It may be that London is so high a corporation that they do formally every year what other corporations do only when necessary. The corporation of London appoints a common serjeant every year (2). Other corporations also may surely employ counsel, but is it necessary they should do so *under seal?

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(TINDAL, Ch. J.: A counsel could not maintain an action against them (3).

ERSKINE, J.: An attorney duly appointed under seal would have the power to retain counsel.)

(1) "The lord mayor's warrant" is in the following form:

"Michaelmas Term, in the year of the reign of the Queen Victoria.

"London (to wit). The mayor, commonalty, and citizens of London, appoint Henry Belward Ray, Esq. § to challenge, prosecute, and defend all the liberties, privileges, and franchises of the said city."

This warrant, engrossed on parchment, is handed to the Recorder, who

reads it aloud; it is then handed back to one of the Masters, who also reads it aloud. The Recorder then prays that the warrant may be entered of record; which the LORD CHIEF JUSTICE orders to be done.

(2) *Serviens ad Legem*, 241.

(3) Counsel cannot maintain any action for fees, and they cannot sue a corporation for a salary *pro consilio impendendo* or for a retainer, unless the salary or retainer be granted by deed.

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In the same way it may be said that the mayor, being appointed the head of the corporation, may retain either counsel or attorney. In *Hartwell v. The Thames Haven Dock and Railway Company* (1), where the plaintiff, the proprietor of a weekly publication, brought an action against the Company, for advertisements inserted in the publication, an objection was raised that it was not shown the authority to insert them was under seal; but the learned Judge overruled the objection.

(TINDAL, Ch. J.: That would come within the exception that a trading corporation may do things necessary for the trade, without giving an authority under seal.)

That doctrine has grown up merely from the inconvenience of adhering to the established rule, and not from any impossibility of doing so in the particular cases. There can be no doubt that attorneys do usually act for corporations, without having any appointment under seal. In actions by or against corporations the Court never requires it to be shown that the attorney on the record was appointed under seal.

The bills, Nos. 4 and 8 (2), arise out of the same proceeding, viz., the suit in Chancery: *The Attorney-General v. The Corporation of Poole* (3). The question there was, as to the right of Mr. Parr, the plaintiff's predecessor in the office of town clerk, to recover a compensation secured to him by a bond, which it was alleged was fraudulent. In this instance there was not only a thorough recognition by the town council of *the plaintiff's employment, but an express authority and direction to him in the fullest terms to appear in the suit for the corporation, embodied in a resolution of the council. And they afterwards voted him the sum 100*l.* on account of his expenses in that suit. The resolution authorizing the mayor to affix the corporate seal to the answer, amounted to a recognition *in pais* of the plaintiff's employment.

The bill, No. 5 (4), was in respect of an action brought by Mr. Parr on the same bond. The attorney on the record in that action was not the plaintiff, but his London agent. In this case the plaintiff had entered an appearance at the request of the mayor, and the act was confirmed by an express resolution of the council. These are the only bills in dispute.

(1) Tried before Maule, J., at Guildhall, on Saturday, 30th of April, 1842.

(2) *Supra*, p. 670.

(3) 2 Keen, 190; *S. C.* on appeal. 4 My. & Cr. 17.

(4) *Supra*, p. 672.

The expenses in question were all such as the corporation were justified in incurring and in paying out of the corporation funds: *The Attorney-General v. The Mayor, &c. of Norwich* (1), *Holdsworth v. The Mayor, &c. of Dartmouth* (2).

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Another question arises as to the bills, Nos. 4 and 8, namely, whether the plaintiff can now have a right to recover in respect of a suit which is not yet terminated. It was formerly considered to be the rule that when an attorney once appeared, or undertook to be attorney for another, he should not be permitted to withdraw himself; but that it was his duty to proceed in the suit, although his client neglected to bring him money: *Tidd's Prac.* 26 (3). But the rule is now settled on the more equitable footing,—that he may abandon the conduct of the suit, and recover his costs up to that time: **Rowson v. Earle* (4), *Van Sandau v. Browne* (5), *Lawrence v. Potts* (6).

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As to the question of appropriation. Money had been paid to the plaintiff on account generally; and the receiver has a right to appropriate a payment to any items of his demand which are due to him in equity and conscience, so long as such appropriation is not inconsistent with any directions given by the party making the payment: *Mills v. Fowkes* (7).

Channell, Serjt., (with whom was *Bere*), for the defendants:

The plaintiff's claim arises out of ten different bills of costs. The arbitrator has made his award in favour of the defendants except as to Nos. 6, 7, 9, and 10. The plaintiff requires the Court to come to a different conclusion as to those bills from that at which the arbitrator has arrived. The defendants on the other hand say, that the amount of the verdict ought to be reduced by appropriating the sums that have been paid,—and which the plaintiff has improperly appropriated to Nos. 2 and 8,—to the further reduction of the four first-mentioned bills. The arbitrator was empowered to make interlocutory awards; and the one under consideration is final only as to the cause of action, and not as to all matters in difference. Suppose, then, the Court should be of opinion that the action cannot be maintained in respect of the charges in Nos. 4 and 8, by reason of there having been no notice of the plaintiff's intention to

(1) 44 R. R. 143 (2 My. & Cr. 408).

(5) 35 R. R. 571 (9 Bing. 402; 2

(2) 53 R. R. 427 (11 Ad. & El. 490; Moo. & Sc. 543).

3 P. & D. 308).

(6) 6 Car. & P. 428.

(3) 9th edit.

(7) 50 R. R. 750 (5 Bing. N. C. 455;

(4) Moo. & Mal. 538.

7 Scott, 444).

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discontinue his conduct of the suit, he would still have it in his power to give such notice hereafter, and would not be concluded from recovering upon that ground.

The bill No. 1 has been abandoned. With regard to the others in dispute, the arbitrator has expressly found that there was no retainer of, or contract with, the plaintiff under the seal of the corporation. And the first question is, whether in the absence of such a retainer or contract, the plaintiff is entitled to recover.

It is not necessary to consider the old authorities, which are uniform in establishing the rule, that a corporation cannot contract except under seal. Upon that rule two exceptions have been grafted, within one or the other of which it is imperative upon the plaintiff to bring his case. The first exception—which appears to be almost coeval with the rule—is, that in some trifling matters a corporation may make certain appointments without deed. The exception is thus stated in *Bac. Abr. Corporations (E.)* 3. “But a corporation may employ one in ordinary services without deed, as a butler, cook,” &c.; and then it is added, “but not to appear for them in an assize, or any other act which concerns their interest or title” (1), which latter sentence is an authority against the plaintiff in the present case. The second exception is the creation of modern times, and refers only to trading corporations, which have been brought into life, for the specific purpose of some particular trade. This exception was not thoroughly admitted in *The East London Waterworks Company v. Bailey* (2); but that case was distinctly overruled, and the exception in question firmly established, by the subsequent cases of *Beverley v. The Lincoln Gas Light and Coke Company* (3), *Church v. The Imperial Gas Light and Coke Company* (4); in which cases the distinction as to executory and executed *contracts, was overruled with respect to such trading companies. In all these modern cases the ancient rule is laid down, and the new principle adopted is clearly mentioned as an exception to that rule. It is quite an error, therefore, to suppose that the old rule has been abrogated. It was recognised and acted upon in this Court in *Gibson v. The East India Company* (5); where it was held that the

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(1) Citing 1 Vent. 47; *Horn v. Ivy*, 1 Mod. 18, S. C. See also the case of *Assize of fresh Force brought in London, Panel v. Moor, &c., Plowd.* 91.

(2) 4 Bing. 283; 12 Moo. 532. (See *ante*, p. 678, n. (6).)

(3) 45 R. R. 626 (6 Ad. & El. 829; 2 Nev. & P. 283).

(4) 45 R. R. 658 (6 Ad. & El. 846; 3 Nev. & P. 35).

(5) 50 R. R. 688 (5 Bing. N. C. 262; 7 Scott, 74).

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retiring pension of a military officer of the East India Company, granted by the Company, but not by deed, did not upon his bankruptcy pass to his assignees, as it could not have been enforced by the officer against the Company. The previous cases of *Beverley v. The Lincoln Gas Light and Coke Company*, and *Church v. The Imperial Gas Light and Coke Company* were there brought under the review of the Court; and the doctrine thereby established was upheld; but on the same ground, of its being an exception to the general rule. The rule was again recognised by the Court of Exchequer in *Mayor, &c., of Ludlow v. Charlton* (1), which has been referred to by the other side. That case was not decided on the narrow ground that the contract related to land; but upon the general application of the old rule. In delivering the judgment of the Court, ROLFE, B., says, "Before dismissing this case, we feel ourselves called upon to say, that the rule of law requiring contracts, entered into by corporations, to be generally entered into under seal, and not by parol, appears to us to be one by no means of a merely technical nature, or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required, as authenticating the concurrence of the whole body corporate. If the Legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to *bind the whole body by his mere signature, or otherwise, then, undoubtedly, the adding a seal would be matter purely of form, and not of substance. Every one becoming a member of such a corporation, knows that he is liable to be bound in his corporate character, by such an act; and persons dealing with the corporation know, that by such an act, the body will be bound. But in other cases, the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however numerous attended is, after all, not the act of the whole body. Every member knows that he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal, as a relic of ignorant times. It is no such thing: either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating, as valid, contracts made with particular members and which do not come within the exceptions to which we

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(1) 55 R. R. 794 (6 M. & W. 815).

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have adverted, might be productive of great inconvenience." The rule for the necessity for a seal has been carried so far, that in *Yarborough v. The Bank of England* (1), it was held, in an action of trover against a corporation, that the Court would, after verdict for the plaintiffs, presume that an authority to do the wrongful act complained of had been given under seal.

The present case falls within neither of the exceptions mentioned. The municipal corporation of Poole is obviously not a trading corporation; and the appointment of an attorney cannot be considered as a trifling matter.

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It is said that a corporation may appoint an attorney by matter of record, as in the instance of the city of *London. But that example, as has been observed by the Court, does not advance the argument; for that is one of the particular privileges of that city, like that of certifying their customs by their Recorder, a privilege which other corporations have not: *Day v. Saradge* (2). The Recorder's certificate is in the nature of a writ (3), and if it be false, no action will lie against the Recorder, as he is but the mouthpiece of the corporation, but the action must be brought against the mayor and aldermen: *Bac. Abr. Customs of London* (4).

(TINDAL, Ch. J.: In the old forms of appearance by attorney it was not stated that he was appointed by deed, even when the action was against a corporation.)

The appearance is only recorded by the attorney for a particular purpose. If an attorney, without authority acts for another, he may be punishable, but the Court do not require him to show his authority. But when he sues for costs, he is then bound to show a retainer. It is said to have been suggested by Lord TENTERDEN, that an attorney ought always to have a retainer in writing (5); but at all events he is bound to show some retainer to entitle him to recover; and the question here is, whether there can be any retainer by a corporation, otherwise than by deed. And certainly if any one appointment more than another requires to be under the corporate seal, it would appear to be that of an attorney, who has of necessity so much authority delegated to him.

With regard to the bill No. 2, the arbitrator has found that there

(1) 14 R. B. 272 (16 East, 6).

(2) Hob. 85 (87).

(3) Rather of a return.

(4) Citing Hobart, *ut supra*.

(5) In *Owen v. Ord*, 3 Car. & P.

349. See also 1 Lill. Prac. Reg. 134,

137.

was no retainer, and that the plaintiff had no right of action in respect thereof; but the question is left for the Court to decide, whether the town council could bind the corporation funds by the resolutions *that are set out in the award. Assuming the necessity of an appointment under seal, there was clearly no valid contract. There was not even a resolution by the council previously to the work being done in respect of which the charges are made. The resolutions are merely as to the payment of the plaintiff's bill. The sixty-ninth section of the 5 & 6 Will. IV. c. 76, points out the manner in which meetings of the town council are to be summoned; and unless that course was followed, a resolution passed at a meeting would be of no avail.

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(TINDAL, Ch. J.: Where the arbitrator says it was resolved by the town council, must we not take it that they were properly summoned? (1).)

Admitting that to be so, still there is no resolution in this particular instance, authorising the employment of the plaintiff. There is only an order from the mayor in the first instance, and the subsequent resolution as to the payment, which is relied upon as a ratification. As town clerk, the plaintiff had the custody of the voting papers, and it was his duty to permit any burgess to inspect them, on payment of 1s. for every search, under section 35 of the 5 & 6 Will. IV. c. 76. A *mandamus* was moved for to compel the plaintiff to permit an inspection of these papers; the costs were incurred in opposing that rule; but the plaintiff was bound to defend himself and pay the costs out of his own pocket, especially as he had a salary allowed him as town clerk. An overseer is in certain cases bound to produce the poor-rate (2); and a *mandamus* would lie against him if he neglected his duty in doing so; but could he charge upon the poor-rate his expenses of opposing the rule? The plaintiff, therefore, having no legal claim to these costs, and the corporation being under no legal liability to pay them, the subsequent resolution to *pay him is of no value.

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(CRESSWELL, J.: Does it not admit that if there could be a binding retainer there has been one?)

It is submitted that such is not its effect. The plaintiff in fact was

(1) Or that all were present; in immaterial.

which case the summons would be (2) See *Wethered v. Calcutt*, *ante*, 606.

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acting as his own client and his own attorney. The supposed ratification by the town council could not create a liability that did not exist previously.

As to the bill No. 3, the plaintiff has already received the costs as taxed between attorney and client; and there is nothing to show a contract to pay him any further costs.

As to Nos. 4 and 8, it may be admitted, that as far as the town council can, by their resolutions, bind the corporation, the corporation would be bound in respect of the charges in these two bills. But the question would still remain as to the right of the plaintiff to recover, the suit not being determined. There is no doubt that an attorney is not compelled, in all cases, to conduct a suit or action to its end, and that he may put himself in a position to recover his costs pending the suit. But the general contract arising out of his retainer is, to conduct the suit to the end; and he can only vary that contract by giving a regular notice of his intention not to continue to act as attorney. That principle is laid down in *Harris v. Osbourn* (1), and indeed in the cases cited upon this point on the other side.

In No. 5 there was a resolution of the town council previous to the employment of the plaintiff; but that, for the reasons before stated, it is submitted does not amount to a valid retainer.

As to the reduction of the verdict: that turns on the right of the plaintiff to appropriate the money he has received to the payment of the bills Nos. 2 and 3. But if those bills are not recoverable, the plaintiff has no such right. A party can only appropriate a payment *where a legal liability to make the payment exists on the part of the debtor, or at least has at some time existed: *Wright v. Laing* (2).

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Bompas, Serjt., in reply :

The distinction between trading corporations and others does not appear to be well founded. *The Mayor of Stafford v. Till* was the case of a municipal corporation. There may be a good reason why an Act relating to the lands of corporations should require the solemnity of a seal, as was the case in *The Mayor of Ludlow v. Charlton*. So as to what is said in *Bac. Abr. Corporations* (E) 3, as to authorising a party to appear for them in an assize. But it is nowhere said that they cannot, except under seal, appoint an

(1) 39 R. R. 872 (2 Cr. & M. 629; 4 Tyr. 445).

(2) 27 R. R. 313 (3 B. & C. 165; 4 Dowl. & Ry. 783).

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attorney to appear for them in an action. It is stated in Tidd's Practice (1) that attorneys were anciently appointed in Court, when actually present; but that they are now usually appointed out of Court by warrant (2), which should regularly be in writing; but an authority by parol is sufficient to support a payment. *Gibson v. The East India Company* was decided upon the ground that the pension was in the nature of half pay. From the case of *Rex v. Arnold* it appears that it was the duty of the plaintiff to refuse the inspection of the papers; and surely he ought to be paid for resisting the *mandamus*, especially as the town council resolved that it should be resisted. As to the plaintiff's right to recover his expenses before the termination of the proceedings in Chancery, no injury can arise to the defendants from the demand; although the suit is going on, the bill has been called for by the defendants. In *Wadsworth v. Marshall* (3) it was held that an attorney who has undertaken a cause is not bound to proceed without adequate *advances from time to time by his client, for expenses out of pocket; and therefore that the Court would not compel an attorney, even after notice of trial, to carry the cause into Court, unless the client supplied him with sufficient funds to pay the expenses out of pocket thereby incurred.

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(ERSKINE, J.: The distinction made in that case seems to be, that an attorney may say he will not go on with a suit without funds to meet expenses out of pocket; not that he can demand payment for his services.)

Cur. adv. vult.

TINDAL, Ch. J. now delivered the judgment of the COURT:

This was an action of debt brought by an attorney who was town clerk and clerk of the peace of the borough of Poole, to recover from the corporation of the mayor, aldermen, and burgesses of Poole, the amount of ten several bills of costs, numbered from 1 to 10.

By an order of Nisi Prius the cause was referred to an arbitrator, who found, as to all the bills except those numbered 6, 7, 9 and 10, that the plaintiff had no retainer under the common seal of the corporation, and decided that he could not recover. As to the bills numbered 6, 7, 9 and 10, he found that the business therein

(1) P. 84, 6th edit.

(3) 37 R. R. 810 (2 Cr. & J. 685).

(2) *Vide infra*, p. 693, n. (2).

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mentioned was done by the plaintiff in his capacity of town clerk and clerk of the peace, and directed that a verdict should be entered in his favour for the sum of 718*l.* 9*s.* 7*d.*, which he found to be due in respect of those bills. He also found, that, after all the bills had been delivered, money was paid on account, generally, by the corporation, and that the plaintiff had applied a portion of it to the bills numbered 2 and 3; and he stated specially the facts upon which his award proceeded, and submitted for the opinion of the Court the following questions: First, whether the facts *stated in the award, furnished sufficient evidence of a retainer of the plaintiff, so as to enable him to maintain this action in respect of the charges contained in the bill No. 1 against the defendants. Secondly, whether, in the absence of any authority under the seal of the corporation, the facts stated furnished evidence of a valid contract or retainer, binding the corporation, so as to enable the plaintiff to maintain this action for the whole, or any, of the bills No. 2, 3, 4, 5 and 8 against the defendants. Thirdly, whether the charges in the bills No. 1, 2, 3, 4, 5 and 8 were for matters concerning which the corporation could enter into a valid contract or give a retainer binding the funds of the corporation, so as to enable the plaintiff to maintain this action in respect of such bills, or any of them, against the defendants. Fourthly, whether the plaintiff had any right of action against the defendants to recover the charges contained in the bills Nos. 4 and 8, the suit to which they refer being undetermined. Fifthly, whether the plaintiff had a right to appropriate the payment of two sums, viz. 141*l.* 11*s.* 10*d.* and 82*l.* 7*s.* 1*d.*, part of the said sum of 350*l.*, to the bills No. 2 and No. 8 respectively. Of these questions, however, it is only necessary to determine those relating to the sufficiency of the retainer, and the application of the money paid on account.

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The case was elaborately argued in last Easter Term, when it was conceded, and rightly conceded, that, in respect of the bill No. 1, amounting to 1,591*l.* 1*s.* 4*d.*, the action was not maintainable, there being no sufficient evidence of a retainer of the plaintiff by the corporation. But, as to the residue of the bills disallowed by the arbitrator, it was contended, that the facts appearing on the face of the award were sufficient to prove a valid retainer, although not under the seal of the corporation; and several instances were pointed out in *which it has been held that corporations aggregate, having a head, may, by parol, appoint servants for the performance of certain acts in their behalf. But the acts which may be so done have

always been considered as exceptions out of the general rule of law, and relate either to trivial matters of frequent occurrence, or such as from their nature do not admit of delay. Cases were also cited in which actions founded on simple contracts have been maintained by and against corporations aggregate. These instances are, for the most part, modern, and relate to corporations established for particular purposes, and where the making of such contracts was essential for carrying those very purposes into execution. For some time it was considered that such actions could be maintained on executed contracts only: but, in *Church v. The Imperial Gas Light and Coke Company* (1), the same principle was extended to actions on executory contracts. These two classes of cases, viz. those relating to the appointment of servants by corporations aggregate, and those founded on simple contracts entered into by trading companies, and the principle upon which they may be supported, were lately considered by the Court of Exchequer in *The Mayor &c. of Ludlow v. Charlton* (2); and it was held by that Court that a municipal corporation was not bound by a contract to pay money, although the consideration had been executed, such contract not being made under their common seal. That case appears to us to be a direct authority in favour of the present defendants; for the appointment of an attorney to conduct important suits affecting the rights and property of the corporation, cannot be considered a trifling matter; nor is it of such frequent occurrence, or of such immediate urgency, as to render it inconvenient to postpone *it until the seal of the corporation can be affixed to the retainer. Still less can it be said that the retainer of an attorney falls within the principle of the decisions relating to contracts made by corporations established for trading purposes.

But another class of cases was cited at the Bar, in which corporations aggregate have been allowed to maintain actions on simple contracts not falling within either of the principles considered in *The Mayor &c. of Ludlow v. Charlton*; such as *The Barber Surgeons of London v. Pelson* (3), which was an action of assumpsit for money forfeited by a bye-law; and *The Dean and Chapter of Rochester v. Pierce* (4), which was assumpsit for use and occupation: and it was contended that all contracts to be binding must be mutual, and that therefore, where corporations may sue

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(1) 45 R. R. 638 (6 Ad. & El. 846;
3 Nev. & P. 35).

(3) 2 Lev. 252.

(4) 1 Camp. 466.

(2) 55 R. R. 794 (6 M. & W. 815).

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upon simple contracts, it follows as a legal consequence they may also be sued. But we think the proposition as to the necessary mutuality of contracts was stated too broadly, and that it must be confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise. The cases last cited do not therefore show that corporations may be sued on parol contracts.

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It was argued for the plaintiff, that, if municipal corporations cannot make contracts in general, yet they may nevertheless make a valid appointment of an attorney, without seal; and the annual appointment of an attorney by the corporation of London was referred to. But that appointment is recorded; and in *The Mayor of Thetford's* case (1), HOLT, Ch. J., explained the ground upon which such appointment is binding. He there said, and the rest of the Court concurred with him, "that, though a corporation cannot do an act *in pais* *without their common seal, yet they may do an act upon record: and that is the case of the city of London every year, who appoint an attorney by warrant of attorney in this Court, without either sealing or signing; and the reason is, because they are estopped by the record to say it is not their act" (2).

It appears to us, therefore, that none of the cases or arguments brought before us are sufficient to establish a right of action in the plaintiff to recover the amount of the bills which the arbitrator disallowed, and that the law laid down by the Court of Exchequer in *The Mayor, &c. of Ludlow v. Charlton* must govern this case.

With respect to the appropriation of a portion of the money received by the plaintiff to the discharge of the bills No. 2 and 3. it appears to us, that, although the plaintiff could not have maintained an action to recover the amount of those bills, yet, as the money was paid generally on account of all the bills after these two bills were delivered, the appropriation of the money made by him at the time cannot now be questioned. The claim of the plaintiff on these two bills was a just and equitable claim, although from the absence of a contract under seal, it could not be made the subject of an action in a court of law. The case, therefore, is not like that of *Wright v. Laing* (3), where there were two contracts,

(1) 1 Salk. 192; 3 Salk. 103; 2 Ld.
 Ray. 848; Lord Holt, 171.

(2) 1 Salk. 192.

(3) 27 R. R. 313 (3 B. & C. 165; 4
 Dowl. & Ry. 783).

the one lawful, the other forbidden by law, and where no specific appropriation had been made at the time of payment (1).

The result is, that the verdict must be entered according to the direction of the arbitrator.

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Rule accordingly (2).

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(4 Man. & G. 954—972; S. C. 5 Scott, N. R. 670; 12 L. J. C. P. 17; 2 Dowl. N. S. 600; 6 Jur. 1042.)

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In assumpsit upon an undertaking to carry goods in the defendants' ship to Canton, and to deliver them to the plaintiffs' agents at Canton, dangers and accidents of the seas and navigation excepted; the defendants pleaded—that they caused the ship to sail to Canton; that the ship arrived with the goods on board, near to the port of Canton; that certain persons then there being officers of our lady the Queen, duly authorised on that behalf, and then exercising the powers of her Majesty's Government there, to wit, one C. Elliott then being chief superintendent of the trade of her Majesty's subjects, to and from the dominions of the Emperor of China, according to the form of the statute in that case made and provided (3 & 4 Will. IV. c. 93), and one Smith then being captain of her Majesty's ship the *Volage*, and then being the commanding officer of her Majesty's naval forces there, did for divers good and sufficient and lawful causes and reasons then in that behalf moving, and not for any wrongful, negligent, unlawful, or improper act or behaviour of the defendants their master or mariners, or any of them done or committed, &c. forcibly interrupt the said ship being a British ship, and all other British ships from further proceeding on its and their said voyage to Canton, and did prohibit, prevent, and discharge the said ship from proceeding to Canton, and did, by virtue of the powers and authorities to them committed and by means of her Majesty's naval forces then there being under their commands, and by the force and duress thereof, forcibly compel the said ship, and from thence continually had compelled the same, not to proceed to Canton, and thereby prevented and thenceforth always continually had prevented, and still did prevent, the defendants from delivering the goods at Canton:

Held, on special demurrer, that the plea was bad, for not sufficiently disclosing that Captains Elliott and Smith, as chief superintendent and commander of the naval forces in the Chinese seas, respectively, had authority to act in the manner alleged.

ASSUMPSIT. The declaration stated that, in consideration that the plaintiffs, at the request of the defendants, then shipped, in

(1) A. does two acts of service for B., one at B.'s request, the other without any provable request. *Quære*, whether A. can appropriate a general payment made by B. to a claim set up by A. in respect of the latter act.

(2) In Com. Dig. Pleader (2 B. 2), it is said, "that the corporation must appear by an attorney, appointed under their common seal;" citing Bro. Abr. Corporations et Capacities,

28. The *placitum* in Brooke, referred to by Comyns, does not bear out the latter statement; but in tit. Garrantie d'Attorney, 36, it is said "Per CHORKE, Justice: A corporation cannot appear but by attorney by deed under their common seal, and otherwise the warrant (of attorney) is void; *quod non negatur: ideo quære* the usage thereof at this day;" citing 21 Edw. IV. 13. And again, in tit. Corporations, 63.

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good order and condition, in and upon the ship called the *Manilla* then lying in the port of Liverpool, and bound for Canton, twenty bales and twenty-five cases of merchandize of the plaintiffs, of great value, to wit, of the value of 700*l.*, to be carried and conveyed by the defendants therein from Liverpool aforesaid, to Canton aforesaid, for certain freight and reward to be paid by the plaintiffs to the defendants in that behalf, the defendants promised the plaintiffs to deliver, and cause to be delivered, the said goods in like good order and condition at the port of Canton aforesaid, all and every dangers and accidents of the seas and *navigation of what nature or kind soever excepted, unto certain persons, to wit, Eglentoun, M'Lean, & Co., or their assigns; that the defendants had and received the said goods on board the said ship for the purpose aforesaid, nevertheless, the defendants did not nor would deliver, or cause to be delivered, the said goods at the port of Canton to the said E., M. & Co., or to their assigns, or otherwise howsoever, although not prevented therefrom by any danger or accident of the seas or navigation, but, on the contrary thereof, wrongfully omitted and refused so to do: that the plaintiffs, by their agents duly authorised in that behalf, &c., sold the said goods at and for certain large prices, to wit, to the amount of 3,000*l.*; and that, by reason of the non-delivery thereof by the defendants, they the plaintiffs were unable to deliver the same to the said purchasers, and all the benefit and advantage of the same sale and the interest and profit or price thereof became and were wholly lost to the plaintiffs; that afterwards, to wit, on the 1st of March, 1840, the defendants unloaded the said goods out of the said ship at a certain place far distant from Canton, to wit, at Manilla, and the plaintiffs became liable to pay and expend, and were forced and obliged to pay and expend, divers sums of money, amounting to a large sum of money, to wit 1,000*l.*, in and about defraying the expenses incurred in respect of the said goods at Manilla, and causing the same to be conveyed from thence to Canton; and that afterwards, to wit on the 1st of April in the year last aforesaid, the plaintiffs were forced and obliged to sell the said goods at a very reduced price from the price for which the same had been so previously sold, to wit, at 1,000*l.* lower price, and the plaintiffs had, by reason of the premises, been otherwise injured.

“CHOKE, J.: Warrant of attorney of a corporation shall be by their common seal, and otherwise it is void;” citing 21 Edw. IV. 7, 12, 27, 67. See also *Rex v. The City of Chester*, Skin. 154.

Eighth plea,—to the breach of promise first above assigned : that, after the making of the promises in the *declaration mentioned, and before any breach thereof, to wit, on the 6th of April, 1839, being a reasonable time in that behalf, the defendants caused the said ship in the declaration mentioned, having the said goods of the plaintiffs so on board thereof, to sail and proceed, and the said ship then sailed and proceeded, on its voyage from Liverpool to Canton, in the dominions of the Emperor of China, being the port of Canton aforesaid ; and in a reasonable time in that behalf, to wit, on the 29th of October, 1839, the said ship with the said goods so on board thereof as aforesaid, arrived near to the said port of Canton, to wit, on the high seas there adjacent ; that, after the said ship had so proceeded and arrived as aforesaid, to wit, on the day and year last aforesaid, certain persons then being officers of our lady the Queen duly authorised in that behalf, and then exercising the powers of H. M.'s Government there, to wit, one Charles Elliott then being chief superintendent of the trade of H. M.'s subjects to and from the dominions of the Emperor of China, according to the form of the statute in such case made and provided, and one Smith then being captain of H. M.'s ship the *Volage*, and then being commanding officer of H. M.'s naval forces there, did, for divers good and sufficient and lawful causes and reasons them in that behalf moving, and not for any wrongful, negligent, unlawful or improper act or behaviour of the defendants, their master or mariners or any of them, done or committed, or supposed or alleged to have been done or committed, forcibly interrupt the said ship, being a British ship, and all other British ships, from further proceeding on its and their said voyage to Canton ; and did, to wit, then prohibit, prevent and discharge the said ship from proceeding to Canton, and did, by virtue of the powers and authorities to them in that behalf committed, and by means of H. M.'s naval forces then there being under their command, and by the force and duress *thereof, forcibly compel the said ship, and from thence continually had compelled the said ship, not to proceed to Canton, and thereby prevented and thenceforth always hitherto have prevented, and still did prevent, the said defendants from delivering the said goods and merchandizes at Canton ; and because of the said force and prevention of the said officers as aforesaid, and because of H. M.'s forces, and the restraint and duress and prevention thereof, the defendants could not, at any time from the making of their said promise, hitherto deliver the said goods at the

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port of Canton, wherefore they did not deliver the same at Canton, as on the said declaration mentioned. Verification.

Ninth plea—to the whole of the declaration—that, after the making of the promises, and before any breach thereof, to wit, on the 6th of April, 1839, being a reasonable time in that behalf, the defendants caused the said ship, having the said goods so on board thereof, to sail and proceed; and the said ship then sailed and proceeded on its voyage from Liverpool to Canton, in the dominions of the Emperor of China, being the port of Canton in the declaration mentioned, and in a reasonable time in that behalf, to wit, on the 29th of October, 1839, arrived near to the said port of Canton, to wit, on the high seas adjacent thereto; that, after the said ship had so proceeded and arrived as aforesaid, to wit, on the day and year last aforesaid, certain persons then being officers of our lady the Queen duly authorised in that behalf, and then exercising the powers of H. M.'s Government there, to wit, one Charles Elliott, then being chief superintendent of the trade of H. M.'s subjects to and from the dominions of the Emperor of China, according to the form of the statute in such case made and provided, and one — Smith, then being captain of H. M.'s ship *Volage*, and then being commanding officer of H. M.'s naval forces there, for divers good and sufficient and lawful causes *and reasons them in that behalf moving, and not for any wrongful, negligent, unlawful, or improper act or behaviour of the defendants, their master or mariners or any of them, by them the defendants, their master or mariners or any of them, done or committed, or supposed or alleged to have been done or committed, did forcibly prevent, hinder, and restrain the said ship from further proceeding on its said voyage to Canton; and did, to wit, then forcibly prevent and hinder and restrain, and thenceforth always hitherto had prevented, hindered, and restrained, and did still prevent, hinder, and distrain upon the said ship, and all other British ships, from proceeding to Canton, and did, by virtue of the powers and authorities to them in that behalf committed, and by means of H. M.'s naval forces then there being under their command, and by the force and duress thereof, forcibly compel the said ship, and from thence continually had constrained and compelled the said ship, not to proceed to Canton, and thereby prevented, and from thence hitherto continued and still continued to prevent, the defendants from delivering the said goods at Canton, wherefore the defendants never delivered the same goods or any of them at Canton, as is in and by the declaration in that behalf

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above alleged; that, before the defendants or their agents had received any notice of the promises, and before the said officers and forces had in any ways prevented the said ship from proceeding to Canton, the said ship proceeded on its voyage to Canton, to parts far distant from Liverpool, to wit, to the high seas near to Canton, on the day and year last aforesaid; that a certain place called Hong Kong was then a place of safety for the said ship and a place to which the said officers and forces did not prevent the said ship from proceeding, and a place near to Canton, and a place from which the said ship and the goods on board thereof might speedily have been conveyed to Canton of the *said officers and forces aforesaid, had at any time ceased to prevent the said ship from proceeding to Canton, and because of the premises, and because it was then a reasonable and discreet measure for the interests of the plaintiffs as owners of the said goods, and for the interests of those concerned in the said adventure, for the said ship and the cargo thereof to proceed to Hong Kong; and because to have proceeded to any other place than Hong Kong, would have been an unreasonable and indiscreet measure in that behalf, and injurious to the plaintiffs as such owners of the said goods, the defendants, by their servant and agent in that behalf, to wit, one William Pearson, then being the master of the said ship, and the servant and agent of the defendants duly authorised in that behalf, caused the said ship, with all reasonable dispatch, after the said ship was so prevented as in this plea mentioned, to proceed to Hong Kong, being the only safe and proper place in that behalf, to wit, on the 29th of October, 1839; that the said W. Pearson did, whilst the said ship was at Hong Kong aforesaid, and in a reasonable time after the arrival of the ship there, to wit, on the day and year last aforesaid, give to the said E., M. & Co., the said persons in the said declaration named, notice of the said several premises, and did then offer the said E., M. & Co. to deliver the said goods to them there, and did then request them to accept and receive the said goods from him, and to give him, the said W. Pearson, orders what to do with the said goods; and that the said E., M. & Co. then refused to receive the said goods, or to give any orders in respect thereof; that the said ship remained at Hong Kong a reasonable time in that behalf, to wit, until the said Charles Elliott, so being such chief superintendent as aforesaid, and the said — Smith so being such officer as aforesaid on the 1st of December, 1839, required and ordered, and compelled, by means of H. M.'s *naval forces there, the said ship

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to depart from Hong Kong ; that, because of the said requirement and orders being lawful requirement and orders in that behalf, and because of the said force and compulsion, the said ship, to wit, on the day and year last aforesaid, sailed from and left Hong Kong ; that, after the said ship left Hong Kong as last aforesaid, the said W. Pearson, in a reasonable time in that behalf, to wit, on the day and year last aforesaid, gave notice to the said E., M. & Co. of the premises, and then requested them to receive the same goods, and to give orders concerning the said goods, and the said E., M. & Co. then wholly refused so to do ; and because the neighbourhood of Canton and of Hong Kong was, then, and from thence continually had been and still was, dangerous for the said ship to remain in, on account of the perils of the seas and navigation, and of the enemies of our lady the Queen then and there being ; and because it was then expedient for the interests of the plaintiffs, that the said goods of the plaintiffs should be deposited in some place of safety ; and because Manilla was a safe and convenient, the nearest and most convenient, place of deposit, and the only safe and convenient place of deposit within a reasonable distance from the said place where the said ship then was and from Canton ; therefore, the said W. Pearson caused the said ship to sail, and the said ship then sailed, to Manilla for the purpose of there depositing the said goods as in this plea mentioned ; and the said goods were, on the 5th of April, 1840, unloaded from and out of the said ship at Manilla, and delivered at Manilla to certain persons there, to wait the orders of the plaintiffs to certain persons trading there, under the firm of Kerr, Murray & Co., then being the agents and correspondents of the plaintiffs at Manilla, duly authorised in that behalf, and being proper and reasonable persons in that behalf with whom *to leave and deposit, and to whom to trust the said goods, which was the same unloading in the declaration complained of, of all which premises the plaintiffs, in a reasonable time in that behalf, to wit, on the 1st of July, 1840, had notice ; that the acts of the defendants, and of the said W. Pearson so being such master as aforesaid, in respect of the said goods from the time of the making of the said promises, hitherto were and each of them was a reasonable and discreet act, and a reasonable and discreet act in that behalf, and were and each of them was truly and honestly, and discreetly, done by the defendants and the said W. Pearson as such master, with a reasonable, discreet, and honest view to the interests of the plaintiffs as such owners, and were and each of

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them was such acts and act as an honest and discreet person would, in the exercise of a sound discretion in that behalf, have done under the circumstances aforesaid, and such as it then became and was the duty of the defendants and of the said master under the circumstances aforesaid to do. Verification.

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Special demurrer to the eighth plea, assigning for causes: that the authority of the officers, Elliott and Smith, to interrupt and prohibit, and prevent and discharge, the ship from proceeding to Canton, was not shown or stated in the said eighth plea, as it ought to have been if any such authority existed; that no such authority was conferred upon them by common or statute law; and that, if they had any such authority, its nature, and how conferred upon them, ought to have been stated and shown in the plea; that it was not shown how or by what authority the officers exercised the powers of H. M.'s Government, as it ought to have been if such authority was exercised; that H. M.'s Government did not by law possess the powers in the eighth plea claimed on behalf of the officers; that the expression, "H. M.'s Government," was insensible and *ambiguous, and had no known, definite, or understood meaning in the law; that it was not stated in the plea, as it ought to have been, what were the causes and reasons moving the officers to interrupt &c., the ship on her voyage; that any force and prevention of such officers, unless legal and authorised by law, constituted no excuse or defence to the breach of contracts complained of in the declaration, &c. Joinder.

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Special demurrer to the ninth plea, assigning the same causes of demurrer as to the eighth plea, and also that so much of the matter contained in the ninth plea, as was in addition to the matter stated in the eighth plea, was pleaded to damage only, and was untechnical and improper, and inartificially pleaded, and rendered the last plea of a great and wholly unnecessary and improper length—that it consisted of matter upon which the plaintiffs could not take or offer any certain issue, &c. Joinder.

Bompas, Serjt. (with whom was *Martin*), in support of the demurrers:

The main grounds of demurrer are applicable to both pleas. The contract entered into by the defendants is an absolute contract to deliver the goods at Canton. The bill of lading contains no exception as to the Queen's enemies, the only exception being of the dangers and accidents of the seas and navigation. It is submitted

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that the eighth and ninth pleas do not disclose any sufficient excuse for the non-performance of the defendants' contract. One of the leading cases upon this subject is *Paradine v. Jane* (1), where "the plaintiff declared in debt upon a lease for years, rendering rent at the four usual feasts; and for rent behind for three years ending at the feast of the Annunciation 21 Car., brought this action. The defendant *pleaded that a certain German prince, by name Prince Rupert, an alien born, enemy to the King and kingdom, had invaded the realm with a hostile army of men, and with the same force did enter upon the defendant's possession, and him expelled and held out of possession from the 19th of July, 18 Car., till the feast of the Annunciation 21 Car.; whereby he could not take the profits. Whereupon the plaintiff demurred. And it was resolved, "that the matter of the plea was insufficient; for though the whole army had been alien enemies, yet he ought to pay his rent. And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest or by enemies, the lessee is excused: Dyer, 33 a (2), Inst. 53 a (3), 283 a (4), 12 Hen. IV. 6 (5). So, of an escape: Co. 4, 84 b (6), 33 Hen. VI. 1 (7). So, in 9 Edw. III. 16, a *supersedeas* was awarded to the justices (8), that they should not proceed in a *cessavit* upon a cesser during the war. But when the party, by his own contract,

(1) Aleyn, 27.

(2) *Anon.*

(3) Co. Litt. 53 a.

(4) Co. Litt. 283 a.

(5) *The Abbot of Shirbourne's case*, M. 12, Hen. IV. fo. 5, 6, pl. 11.

(6) *Luttrell's case*.

(7) *Jack Cade's case*, H. 33 Hen. VI. fo. 1, pl. 3.

(8) But not acted upon. P. 9 Edw. III. fo. 16, pl. 30, was a *cessavit* brought in the county of Northumberland. *Purnell*, the tenant's serjeant, pleaded to the jurisdiction, "that the commonalty of the county had made their plaint and suggestion to King Edward, father of the now King, that the said county had been destroyed by the war of Scotland, so that the people could not take the profits of their lands, and that the lords had brought their writs of

cessavit to recover the lands; wherefore the King (Edward II.) forbade that any writ of *cessavit* should be granted against the people of that county during the said war until otherwise commanded; and that the said late King had sent to this Court his writ, commanding that if any such writ was sent before you here, you should surcease from holding that plea. And we say that the war still continues; wherefore we do not intend that you will hold this plea. Whereupon the writ was read, which was to the effect pleaded. And the writ was of the date of the twelfth year of the father of the now King, &c. HERLE, Ch. J.: We have a command by the writ of the King that now is, to hold this plea. Therefore we will not surcease by reason of any writ sent to us by the King that is dead. Wherefore answer."

*creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And, therefore, if the lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it: Dyer, 38 a, 40 Edw. III. 6" (1).

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That case has been repeatedly recognised and affirmed in more modern decisions. It is not necessary to contend, that if the delivery of the goods at Canton had become unlawful, the defendants would have been bound to perform their contract. It is sufficient to say, that neither of these pleas shows that the delivery of the goods at Canton had become unlawful. The pleas undoubtedly allege, that certain persons duly authorised, and exercising the powers of H. M.'s Government at Canton, prevented the landing of the goods; but it ought to have been shown what authority these persons had; for it is impossible to understand what is meant by the phrase, "exercising the powers of H. M.'s Government there." It may be admitted, that if there were any statute which empowered Captain Elliott or Captain Smith to restrain the vessel from proceeding to Canton, the Court must take judicial notice of such statute. The only Act, however, at all bearing on the subject, is the 3 & 4 Will. IV. c. 93, which authorises the Crown to appoint a superintendent at Canton. But the pleas contain no averment that Captain Elliott had been appointed chief superintendent under the Act; and what authority *Captain Smith could have as commanding officer of H. M.'s naval force, does not appear; for there is no allegation of any embargo or blockade. Neither is any fact stated which would render it illegal for the ship to go to Canton. It was held in *Gosling v. Higgins* (2), that if goods put on board a ship to be carried from one place to another, are wrongfully seized by the officers of the Government, so that they cannot be delivered to the consignee, the owner of the goods has an action for the non-delivery against the owner of the ship, who must seek his remedy over against the officers of Government. So, in *Hill v. Idle* (3), the consignee of a particular parcel of goods by a general ship, was held liable to the owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity of procuring an order from the Treasury to land the goods, which order the consignee used the utmost diligence to

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(1) H. 40 Edw. III. fo. 5 & 6, pl. 11. (3) 16 R. R. 797 (4 Camp. 327).
(2) 10 R. R. 726 (1 Camp. 451).

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obtain. *Barker v. Hodgson* (1) is a stronger case. It was there held, that a charterer of a ship, who covenants to send a cargo alongside at a foreign port, is not excused from sending it alongside, though, in consequence of the prevalence of an infectious disorder at the port, all public intercourse is prohibited by the law at the port, and though he could not have communication without danger of contracting and communicating the disorder. Lord ELLENBOROUGH says, "the question is, on which side the burden is to fall. If, indeed, the performance of this covenant had been rendered unlawful by the Government of this country, the contract would have been dissolved on both sides; and this defendant, as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But, *if in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, neither is the contract dissolved, nor is he excused for not performing it, but must answer in damages." It is laid down in *Abbott on Shipping*, 428, 5th ed. (2), citing *Blight v. Page* (3), that "if a merchant hire a ship to go to a foreign port, and covenant to furnish a loading there, a prohibition by the Government of that country to export the intended articles, neither dissolves the contract nor excuses a non-performance of it: for the laws of one nation do not give effect to the positive institutions of another inconsistent with its own." It is not sufficient for a defendant to show that he has been prevented from performing his contract. He must go further, and establish that the parties who prevented him had a right to do so; and the authority of these parties ought to have been set out, in order to enable the Court to judge whether it was legal.

The ninth plea attempts to justify the landing of the goods at Manilla. Admitting, for the sake of argument, that it was unlawful to go to Canton, the defendants had no right to discharge the goods at Manilla. If they were legally prevented from delivering their goods to the consignees at Canton they should have returned them to the plaintiff. For there is nothing in the plea to show that the goods were landed at Manilla for the purpose of being afterwards conveyed to Canton. Moreover, the defendants should have kept the goods on board until they could proceed with them to Canton; for it is consistent with all that is stated, that the ship could have

(1) 15 R. R. 485 (3 M. & S. 267).

(2) 7th ed. 597 [14th ed. 867].

(3) 6 R. R. 795, n. (3 Bos. & P. 295, n.).

gone to Canton the next day; for there is no averment of any blockade, or of any war with China. In *Hadley v. Clarke* (1), the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn; on the *vessel arriving at Falmouth, in the course of her voyage, an embargo was laid on her "until the further order of council;" and it was held that such embargo only suspended, but did not dissolve, the contract between the parties, and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract.

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Channell, Serjt. :

The authority of *Paradine v. Jane*, for the general rule there laid down, is not denied; and it is conceded that an embargo by a foreign Government furnishes no excuse to an English ship-owner for the non-performance of his contract. Admitting the general rule, however, it is contended that an exception necessarily arises where the performance of a contract is forbidden by the country of which the contracting parties are subjects; and it is submitted that such an implied exception is sufficiently made out by the facts stated in these pleas. The defendants are not driven to contend that there has been any dissolution of the contract; they contend merely for a suspension. *Hadley v. Clarke*, in some respects, resembles the present case; but here the prohibiting to land the goods is stated as continuing down to the time of action. *Touteng v. Hubbard* (2) proceeded very much on the principle now contended for, which is laid down in the judgment of Lord ELLENBOROUGH in *Barker v. Hodgson*, cited on the other side (3). The question is, whether it sufficiently appears in the pleas, that the defendants were prevented from landing the goods by the authority of the Government of this country. Generality of pleading is allowed in many cases where more particularity would lead to prolixity, or where the facts are incapable of being precisely stated. Whether the authority is sufficiently set out in these pleas, must be determined with reference *to the circumstances disclosed. It is obvious that the same precision which is necessary in many cases will not be required here. It cannot be expected that the defendants should state the authority, step by step, of the parties who prohibited them from landing the goods, or set out the reasons which led to the prohibition; for acts of state policy are

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(1) 4 R. R. 641 (8 T. R. 259).

(3) *Ante*, p. 702.

(2) 6 R. R. 791 (3 Bos. & P. 291).

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necessarily secret in their nature. It is submitted that the pleas are good in substance, and that the allegations as to the defendants being prevented from performing their contract by the acts of officers or servants of the Government, lawfully authorised, are made with all the particularity of which the case will admit.

Bompas, Serjt., in reply :

The argument advanced on the part of the defendants is, that the interruption on the part of Capt. Elliott, and Capt. Smith, created a suspension only. This shows the two special pleas to be bad. The defendants have failed to make out that the act of those officers in preventing the delivery of the goods, was lawful. It has been contended that the act of those officers was the act of the British Government. But it is not stated that the act complained of was done under any authority. The pleas contain no allegation of the existence of war, or of any danger of war. As no lawful interference is shown, the plaintiffs are entitled to judgment.

TINDAL, Ch. J. :

I am of opinion that the two pleas which have been demurred to are bad in point of law. The only ground upon which they could be an answer to the declaration would be, that the contract was dissolved by some superior authority. But the allegation amounts to no more than this,—that after the arrival of the ship and goods at Canton, certain persons, then being officers of the Queen, and duly authorised in that behalf, and then exercising the powers of her Majesty's Government there, to wit one Charles *Elliott, then being chief superintendent of the trade of her Majesty's subjects to and from the dominions of the Emperor of China, according to the form of the statute in such case made and provided, and one Smith, then being captain of H. M.'s ship the *Volage*, and then being the commanding officer of H. M.'s naval forces there, did, for divers good and sufficient and lawful reasons, them in that behalf moving, and not for any wrongful, negligent, unlawful, or improper act or behaviour of the defendants, their master, or mariners, or any of them, done or committed, or supposed, or alleged to have been done or committed, forcibly interrupt the said ship, being a British ship, and all other British ships, from further proceeding on its and their said voyage to Canton, and did, to wit, then prohibit, prevent and discharge the said ship from proceeding to Canton, and did, by virtue of the powers and authorities to

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them in that behalf committed, and by means of H. M.'s naval forces then there being under their command, and by force and duress thereof, forcibly compel the said ship, and from thence continually had compelled the same, not to proceed to Canton, and thereby prevented, and thenceforth always hitherto had prevented, and still did prevent, the defendants from delivering the said goods at Canton. It is not said that this was done in the exercise of any prerogative of the Crown, to which it belongs to declare war and to make peace. But if war had been declared between England and China, it would not have been a case in which the contract of the parties would have been dissolved, as when a declaration of war has been held to put an end to a contract to carry goods to those who are now become enemies. Here, the engagement is to deliver goods to the agent of the shipper. The pleas seek to qualify the non-performance of the contract, under the act of the chief superintendent, Captain Elliott. We must see whether the Act of the 3 & 4 Will. IV. *c. 98, gives any such authority. By the 5th section, after reciting that it is expedient for the objects of trade and amicable intercourse with the dominions of the Emperor of China, that provision be made for the establishment of a British authority in the said dominions, enacts "that it shall and may be lawful for his Majesty, by any commission, or commissions, or warrant, or warrants, under his Royal sign manual, to appoint not exceeding three of his Majesty's subjects, to be superintendents of the trade of his Majesty's subjects, to and from the said dominions, for the purpose of protecting and promoting such trade, and by any such commission or warrant as aforesaid, to settle such gradation and subordination among the said superintendents, one of whom shall be styled the chief superintendent, and to appoint such officers to assist them in the execution of their duties and to grant such salaries to such superintendents and officers as his Majesty shall from time to time deem expedient." By this section the Commissioner is armed with power to regulate the rotation of trade between this country and the dominion of the Emperor of China. By sect. 6, it is provided "that it shall be lawful for his Majesty, by any such order or orders, commission or commissions as to his Majesty in Council shall appear expedient and salutary, to give to the said superintendents, or any of them, powers and authorities over and in respect of the trade and commerce of his Majesty's subjects within any part of the said dominions, and to make and

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issue directions and regulations touching the said trade and commerce, and for the government of his Majesty's subjects within the said dominions, and to impose penalties, forfeitures, or imprisonments, for the breach of any such directions or regulations, to be enforced in such manner as in the said order or orders shall be specified, and to create a court of justice, with criminal and Admiralty jurisdiction, for the trial of offences committed by his Majesty's subjects *within the said dominions, and the ports and havens thereof, and on the high seas within one hundred miles of the coast of China, and to appoint one of the superintendents hereinbefore mentioned, to be the officer to hold such Court, and other officers for executing the process thereof, and to grant such salaries to such officers," &c.

Under this section, Capt. Elliott might have been armed with sufficient power to make regulations for the government of the war, both between British subjects and the subjects of the Emperor of China. But the pleas do not state that any orders were issued by the Privy Council. Capt. Elliott may have exercised a sound discretion in preventing the goods from being landed at Canton. That, however, does not constitute a legal answer to the complaint of the non-delivery of the goods. It is not shown that the contract made by the defendant to deliver the goods to the plaintiff's agent at Canton had been dissolved.

COLTMAN, J. :

I am of the same opinion. The question appears to me to be a very narrow one. It is agreed on both sides, that unless the delivery of the goods at Canton is shown to have been prevented by some competent authority, the two pleas demurred to cannot be supported. The authority must be stated on the face of the pleas. The defendants not being in privity with the party who makes the order, may not be bound to show the authority with the same particularity as would be necessary where such privity exists. I do not say how that would be. But here, we find no statement at all of any authority under which Captain Elliott acted. The mere fact of his being superintendent without any order from the Privy Council, does not import that he had authority to make or to issue directions and regulations under the sixth section. The fifth section confers *very limited powers. It gives nothing further than what is necessarily implied in the term "superintendent." Both these pleas appear to me to be substantially defective in not

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containing an allegation of any power conferred on Capt. Elliott by an order in Council.

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ERSKINE, J. :

It has been properly admitted by my brother *Bompas*, that if the defendants were prevented from delivering the goods by any person having due authority from this country, there would be a good answer to the present action. I am of opinion that no such authority appears in either of the pleas.

MAULE, J. :

I am of the same opinion. It has not been argued that any general prerogative exists under which these acts on the part of Captain Elliott and Captain Smith could be justified. Then the statute only empowers them to act under an order made by the King in Council, and there is nothing to show that any order in Council has been made.

Judgment for the plaintiff.

LEAKE v. LOVEDAY AND BROOKS (1).

(4 Man. & G. 972—986; S. C. 5 Scott, N. R. 908; 12 L. J. C. P. 65; 2 Dowl. N. S. 624; 7 Jur. 17.)

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A. in 1837 bought goods of B., and allowed B. to remain in possession of them up to 1839, when B. became bankrupt. B.'s assignees made no claim, and B. retained possession of the goods until 1841, when the sheriff under a *fi. fa.* against B. seized and sold the goods. After the sale B.'s assignees gave notice of their claim to the sheriff, who upon receiving an indemnity handed over the proceeds to them.

In trover brought by A. against the sheriff, held: that, under the plea of not possessed, the sheriff might set up the title of the assignees.

CASE. The first count in the declaration stated that one Cox was tenant to the plaintiff of certain premises in the county of Oxford under a demise thereof at *a certain weekly rent, to wit, the weekly rent of 5s., of which 42l. was in arrear; that the plaintiff had seized divers goods as for and in the name of a distress, and had impounded them in a certain messuage; and that the defendants broke the pound and took away the goods. The second count was in trover.

Pleas: first, not guilty to the whole declaration; secondly, to the first count, that Cox did not hold as tenant to the plaintiff, *modo et formâ*; thirdly, to the first count, that the rent was not in arrear;

(1) See the Preface to this volume.—F. P.

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fourthly, to the first count, that the plaintiff did not seize the goods as and for a distress; fifthly, to the first count, that the plaintiff did not impound the goods; sixthly, to the first count, that before the plaintiff had seized and impounded the goods, a writ of *habere facias possessionem* issued to the defendant Loveday, as sheriff of the county of Oxford; that the message in which the plaintiff had impounded the goods was parcel of the tenements in the writ mentioned, and thereupon the defendant Loveday as sheriff, and the defendant Brooks as his servant, entered upon the message; that because the defendant Loveday could not give possession of the message without removing the goods, and because the plaintiff refused to remove them, the defendants removed the goods and deposited them at a reasonable distance for the use of the person entitled thereto: verification.

Seventh plea, to the second count, that the plaintiff was not possessed, as of his own property, of the goods in that count mentioned, or any part thereof, *modo et formâ*: concluding to the country.

The eighth plea set up a justification of the conversion of the goods in the second count similar to that contained in the sixth.

[*974] The plaintiff, by his replication, joined issue on the first, second, third, fourth, fifth, and sixth pleas. To *the sixth he new assigned that the pound broken by the defendants was another and a different pound from that mentioned in the sixth plea. There was also a new assignment to the eighth plea that the defendant, on another and different time, and for another and different occasion, converted the goods mentioned in the second count.

Pleas to the first new assignment: first, not guilty; secondly, that the defendants did not impound the goods. To the new assignment to the eighth plea the defendants pleaded, first, not guilty; and, secondly, that the plaintiff was not possessed as of his own property of the goods in the second new assignment mentioned, or any part thereof, *modo et formâ*.

Upon all these pleas the plaintiff joined issue.

At the trial, before Erskine, J., at the last Oxfordshire Summer Assizes, it appeared that a person of the name of Cox had, previously to a year 1837, been a partner with Messrs. Morrell in a Bank at Oxford, and had resided in the upper part of the house in which the banking establishment was conducted; and that after the dissolution of the partnership, Messrs. Morrell, to whom the house belonged, permitted him to occupy the same apartments without paying rent. In June, 1837, Cox's goods were seized under

a *fi. fa.* issued upon a judgment recovered against him by Cullis and Woodhouse, and the goods having been appraised at 350*l.*, the sheriff, on the 1st of January, 1838, on receiving that amount from the plaintiff, executed a bill of sale to him of the goods, and gave him possession thereof. On the 4th of January Cox entered into an agreement with the plaintiff, whereby he agreed to pay the plaintiff 12*s.* a week for the goods, and attorned tenant to him of the rooms in which the goods were placed, at 5*s.* a week. On the 15th of December a *fiat* issued against Cox, under which he was declared a bankrupt; and on the 23rd of January, *1839, assignees were duly appointed. Soon after the adjudication a messenger of the Court of Bankruptcy went to Oxford in order to take possession of the bankrupt's goods; but, on Cox showing him the bill of sale, he withdrew, leaving Cox in possession of the goods. On the 20th of July, 1841, the plaintiff put in a distress for 42*l.*, the arrears of the weekly rent, under which he seized certain other goods belonging to Cox. On the 25th or 26th of July the defendant Brooks entered the premises under a writ of *habere facias possessionem* issued upon judgment signed by Messrs. Morrell, by virtue of a warrant of attorney, to confess judgment in an action of ejectment which had been executed by the bankrupt, and removed both the goods included in the bill of sale and also the goods which had been distrained upon, into the street. The goods were afterwards placed by a third party in an empty house adjoining. On the 11th of August the defendant Loveday seized the goods under two writs of *fi. fa.* issued against Cox at the suit of two different creditors, and on the 20th sold them by auction. After the sale the assignees of Cox gave notice to the sheriff that they claimed the goods; whereupon the sheriff, on receiving an indemnity from the assignees, paid over to them the net proceeds of the sale, amounting to 232*l.* 18*s.* 2*d.*

The bankruptcy of Cox, as also the trading petitioning creditors' debt and the act of bankruptcy, and the appointment of assignees were admitted. The fact of the sheriff being indemnified by the assignees was proved by the undersheriff, who was called as a witness on the part of the plaintiff.

It was contended for the defendants that the bill of sale was colourable and fraudulent, and that no property in the goods included in it ever passed to the plaintiff. It was also insisted that, even assuming the transaction to be *bonâ fide*, as the plaintiff had allowed *the goods to remain in the order and disposition of the

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bankrupt, the assignees were entitled to them. For the plaintiff it was argued that the defendant could not, under the plea of "not possessed," set up the right of third parties, the only question under that plea being whether the plaintiff was entitled to the goods as against the defendants. The learned Judge expressed an opinion that it was not open to the defendants to set up the title of the assignees; and, after directing a verdict to be entered for the defendants upon so much of the first issue as related to the first count, with respect to which no case had been made out; and also upon the fifth, sixth, and seventh issues, he left it to the jury to say whether the bill of sale was *bonâ fide* or was fraudulent and colourable.

The jury having returned a verdict for the plaintiff upon all the issues arising out of the count in trover, with 25*l.* 3*s.* 6*d.* damages, it was agreed that the defendants should be at liberty to move to enter a verdict for them upon the issues raised by the pleas of "not possessed," in case the Court should be of opinion that the goods, at the time of the bankruptcy, were left in the order and disposition of the bankrupt, with the consent of the true owner, and that the defendants were not precluded from setting up the title of the assignees.

Talfourd, Serjt. having, on a former day in this Term, obtained a rule *nisi*,

Channell, Serjt. (with whom was *W. J. Alexander*) now showed cause:

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The question in this case is, whether the sheriff, having sold the goods under two writs of execution, can set up the title of Cox's assignees in order to disprove the plaintiff's property in the goods; and it is submitted that he cannot do so. It is not denied that the plea of "not possessed" raises the question *of property, to a certain extent. If the assignees had been the defendants, they might have set up this defence; but it is not competent to the defendants, who have seized and sold the goods as the goods of Cox, to turn round and say that they belonged to his assignees. It is not contended that a defendant may not set up the title of a third party under a plea of "not possessed;" but it must be the title of some person connected with the defendants, and identified with them in point of interest; but here the assignees must be considered as strangers to the sheriff; for he seized and sold the goods, not on their account, but adversely to their claim.

(MAULE, J. : This is not an action of trespass, but of trover.)

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There is no distinction, so far as this case is concerned, between trespass and trover. In *Carne v. Brice* (1), which was an issue under the Interpleader Act to try whether wearing apparel taken in execution under a *fi. fa.* against one Morgan, was his property or not : Lord ABINGER, C. B. rejected evidence of Morgan's bankruptcy, which was tendered to show that, at all events, the property was not vested in him but in his assignees ; and this ruling was confirmed by the Court of Exchequer. *Chase v. Goble* (2) may be cited as qualifying the doctrine laid down in *Carne v. Brice* (1). In that case, however, the defendant was a creditor, and he had an interest in supporting the claim of the assignees by the deed, which amounted to an act of bankruptcy. *Owen v. Knight* (3) and *Butler v. Hobson* (4) will probably be also alluded to by the other side. But in *Owen v. Knight* the defendant asserted a property in himself. So, in *Butler v. Hobson* ; for there likewise the assignees had an interest in setting up the title of the third party, inasmuch as the property in the hands of such party would be a *fund in which all the creditors would share.

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(COLTMAN, J. : Has not the sheriff an interest here ? If he were to pay the proceeds over to the plaintiff, would he not be liable to an action at the suit of the assignees ?)

Here, the assignees do not make any claim until after the seizure and sale ; and the sheriff having sold the goods as the goods of Cox, is estopped from setting up any authority subsequently derived from the assignees, which can only have a retrospective operation. In Brooke's Abr. tit. Justification, pl. 14 (citing Year Book 7 Hen. IV. 13 (5)), it is said that if a man, having no right, distrain in his own right, and after justify as bailiff of the lord, this is not a good justification ; but if he distrained as bailiff, though he were not so in fact, and the lord afterwards agreed to the taking, such justification would be good.

(MAULE, J. : Suppose the defendants had pleaded that the goods were the goods of the assignees ?)

(1) 56 R. R. 684 (7 M. & W. 183 ; 8 Dowl. P. C. 884).

(2) 58 R. R. 605 (2 Man. & G. p. 930 ; 3 Scott, N. R. 245).

(3) 44 R. R. 649 (4 Bing. N. C. 54 ; 5 Scott, 307).

(4) 4 Bing. N. C. 290 ; 5 Scott, 798.

(5) The case here intended to be referred to would rather appear to be H. 7 Hen. IV. fo. 34, pl. 1. And see

4 Nev. & M. 804.

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They are not justifying a conversion, but are only stating facts to show that the plaintiff has no right to complain of a conversion.

(TINDAL, Ch. J.: If the sheriff, instead of defending the action, had come to the Court under the Interpleader Act, might not the assignees, under an issue, have set up that the goods belonged to them by reason of Cox having been in possession of them with the consent of the true owner?)

In that case the plaintiff would have known that the defendants meant to set up that defence in addition to the objection to the bill of sale, and the contest would then have been with the execution creditor. * * *

[979] *Talfourd*, Serjt. (with whom was *Keating*) in support of the rule:

After the cases of *Lingard v. Messiter* (1) and *Watson v. Peache* (2), it cannot be disputed that at the time of the bankruptcy, the assignees became entitled to the goods which were in the order and disposition of Cox, with the consent of the true owner ; and if so, it is clear that the assignees are not precluded from asserting their title, because an ignorant messenger, after looking at the bill of sale, withdrew from the premises. *Isaac v. *Belcher* shows that they may set up their title under the plea of not possessed. The assignees might have waived the tort, and brought an action for money had and received, if the proceeds of the sale had not been paid over to them. In trover a plaintiff is bound to make out an absolute title as against all the world. No authority has been produced to show that in trover (whatever may be the case in trespass) a sheriff situated like the defendant Loveday is estopped from setting up the right of third parties. In trover the plaintiff complains not of a wrongful taking, but of a wrongful conversion. Trover, therefore, essentially differs from trespass, and gives rise to a question as to the property in the goods. The case cited from the Year Book is not in point. It was an action of trespass, and the issue taken was, whether at the time of seizing the goods the party was the bailiff of the lord. In *Carne v. Brice* the evidence was rejected, not because it was inadmissible, but because it would have been against good faith and the understanding of the parties to allow it to be given. Here, the plaintiff was not taken by surprise by the title of the assignees being set up, for he knew they were the real defendants, and that the sheriff had paid over the money to them on an indemnity, and

(1) 1 B. & C. 308 ; 2 Dowl. & Ry. 495. (2) 1 Bing. N. C. 327 ; 1 Scott, 149.

proved that fact as part of his case. *Owen v. Knight, Butler v. Hobson*, and *Chase v. Goble* are in favour of the defendants, and cannot be distinguished in point of principle from this case.

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TINDAL, Ch. J. :

It seems to me that the verdict in this case ought to be entered for the defendants, the parties having very properly agreed that instead of there being a new trial, the verdict should be so entered if the Court should be of opinion that the plaintiff was not entitled to recover. The main question which was raised at the trial, and which has been argued before us, is, whether upon the pleadings as they stand, and under the circumstances *proved, the sheriff had a right to set up the *jus tertii*. If he had, there can be no doubt that the property of the goods in respect of which the action is brought, must be regarded as having vested in the assignees of Cox from the time of his bankruptcy. This is not like the ordinary case of goods left in a ready-furnished house, by which no false colour is held out to the world by reason of the apparent ownership of the bankrupt. Here, it appears that the goods were originally the property of Cox, and that they were assigned to the plaintiff by a bill of sale, no alteration being made in their place of deposit; so that the bankrupt still continued to have them in his order and disposition. The case therefore falls within the principle of *Lingard v. Messiter*, *Watson v. Peache*, and that class of cases; and I have no hesitation in saying, that if the sheriff can avail himself of the title of the assignees, the right to the goods is in them. The action is trover, to which the defendants have pleaded not guilty, and that the plaintiff was not possessed of the goods as his own property; and the question is, whether, under the latter plea, the title of third persons may be set up. It seems to me, that from the very form of that plea, the plaintiff is called upon to prove the goods to be his property, and that the defendants are let into any evidence which will show that such goods are not the plaintiff's. The count in trover contains two allegations, both of which under the old rules of pleading were put in issue by the plea of not guilty; namely, that the goods were the property of the plaintiff, and that they had been converted by the defendant. Many cases occurred previously to the new rules, in which a defendant was permitted to set up the *jus tertii*. For instance, in *Blainfield v. March* (1), where the plaintiff *brought trover as administrator, and declared on the

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possession of the intestate ; and upon not guilty pleaded, the counsel for the defendant at the trial, offered to give in evidence that the pretended intestate made a will and appointed an executor, but HOLT, Ch. J. overruled it, and took this diversity, that where an administrator brings trover upon his own possession, the defendant may give in evidence a will, and an executor upon not guilty, otherwise if it be in the possession of the intestate (as in the principal case), for there the defendant ought to plead it in abatement ; and if he does not, he shall not give it in evidence. So in *Dawes v. Peck* (1), in an action on the case by the consignor of goods against a common carrier for not safely carrying according to his undertaking, the carrier was permitted to show that the property in the goods was not in the consignor but in the consignee. These authorities are sufficient to show, that formerly in trover it was competent to a defendant, under not guilty, to set up the right of a third person as an answer to the action. I do not see why the same course should not be allowed under the plea of not possessed. *Carne v. Brice* (2) at first sight appears to be in favour of the plaintiff ; but the proper answer seems to have been given to it, namely, that it was an issue directed by the Court to try the particular fact, and, therefore, peculiarly under the guidance and control of the Court, who might well refuse to allow the *jus tertii* to be set up in surprise of the plaintiff. That, however, is not the case here ; neither was there any surprise ; for the *fiat* and the proceedings thereon had been admitted between the parties, and the plaintiff himself called a witness to prove that the sheriff was indemnified by the assignees. It is clear that the real battle was between the plaintiff and the assignees ; though the plaintiff may have thought that *the main contest would be with respect to the validity of the bill of sale, and so have overlooked this line of defence. But whether that be so or not, as the objection was taken before the verdict was given, the defendants had a right to insist upon it ; and as I am of opinion that if the point had been left to the jury they must have found that the goods were in the control and disposition of the bankrupt, the verdict ought to be entered for the defendants.

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COLTMAN, J. :

I also am of opinion that upon the facts of this case the verdict

(1) 4 R. R. 675 (8 T. R. 330).

(2) 56 R. R. 684 (7 M. & W. 183 ; 8 Dowl. P. C. 884).

on the issue alien on the plea of not possessed ought to be entered for the defendants. In the first place, has the plaintiff any property in the goods? The alleged conversion takes place when the goods are seized by the sheriff; and it is said that the sheriff was, at that time, as against the plaintiff, a wrong-doer, inasmuch as the assignees had not then come forward to assert their title. But they do assert it afterwards; and the effect is, to vest the property of the goods in them from the time of the bankruptcy. Upon this state of facts the sheriff is clearly not a trespasser as against the plaintiff; for he has seized, not his goods, but the goods of the assignees. That being so, the issue is found for the defendants, provided they are not estopped from setting up the title of the assignees. The rule whereby a party is precluded from availing himself of the *jus tertii* is not so extensive as has been contended. I have always understood it to apply only to cases where a person has placed himself in a position which prevents him from setting up a title in a third party.

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ERSKINE, J. :

At the trial two points were insisted on by the defendants under the plea of not possessed; first, that the plaintiff never had any property in the *goods, inasmuch as the bill of sale under which he claimed was fraudulent, the goods being bought with the bankrupt's money. That question was left to the jury, who found that the transaction was *bonâ fide*, and that the goods were the property of the plaintiff at the time of Cox's bankruptcy. The second ground of defence was, that admitting that the goods passed to the plaintiff under the bill of sale, yet inasmuch as they were in the order and disposition of Cox at the time of his bankruptcy, with the consent of the plaintiff, the true owner, they vested in the assignees. It occurred to me at the trial, that if the assignees had been the defendants, they might clearly have set up as a defence to the action that the goods were theirs, and might have urged that defence successfully; for the goods having been Cox's originally, and the bill of sale having been kept secret from the world, it was one of those cases for which the Legislature meant to provide. But it also occurred to me, that inasmuch as the assignees were not the defendants, and as the sheriff did not set up any authority from them, the defence that the goods belonged to the assignees was not open to him. I am now satisfied that I was wrong, and that the verdict ought to be entered for the defendants. The plea of "not

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possessed " puts in issue, not the right of the sheriff to seize the goods, but the plaintiff's property in them. The plaintiff, therefore, was bound to prove, not only that the goods became his in 1837, the date of the bill of sale, but that they continued his property down to the time of their being seized by the sheriff. It appeared to me, as the goods were in the plaintiff's possession, and the assignees had then asserted no right to them, the sheriff, by selling them, was guilty of a complete conversion. But I now agree with the rest of the Court, that the goods were at that time the property of the assignees; and as they afterwards asserted their right to them, and called upon *the sheriff to pay over the proceeds of the sale, the defendants were at liberty to set up the title of the assignees as an answer to this action.

MAULE, J. :

The right of the assignees to the goods in question depends upon whether those goods were in the order and disposition of Cox at the time of his bankruptcy, with the consent of the true owner, within the meaning of the 6 Geo. IV. c. 16, s. 72 (1). The cases show that when assignees assert their title, as has been done here, the goods vest in them from the time of the bankruptcy. The observation of PARKE, J. in *Isaac v. Belcher* (2), "that the plea that the plaintiff was not possessed, in this form of action puts in issue the right of the plaintiff to the possession of the goods as against the defendant, at the time of the conversion," is to be understood, not as narrowing but as enlarging the defence under that plea. There, under "not possessed," the defendants as assignees claimed, not an actual property in the goods, but a right to take them as being in the order and disposition of the bankrupt at the time of his bankruptcy; and on its being contended that this could not be given in evidence under that plea, PARKE, B. in effect states, that the defendants might say, though the plaintiff has the property in the goods, he has none as against us. The question here is, whether the sheriff may set up the title of the assignees; and when the nature of the issue is looked at, the evidence is clearly admissible. This is not an action of trespass, for damage done to some chattel which the plaintiff asserts to be his. In trover the plaintiff seeks to recover for the wrongful conversion of property which he admits to have come lawfully into the possession of the defendants. The allegation

(1) See now Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii.).—A. C. 516. (2) 5 M. & W. 139; 7 Dowl. P. C.

in the declaration is, that the *plaintiff was lawfully possessed of the goods as of his own property. The effect of denying that averment is, to raise a question whether the plaintiff has such a title as will enable him to maintain an action of trover in respect of it. The defendant may show, either that the plaintiff has no right against any body, or that he the defendant has some right which prevents the plaintiff from maintaining the action against him. Here, the defendants say that the plaintiff has no right to the goods at all. The evidence given by them was offered, not to show the right of third persons, but to prove that the goods were not the property of the plaintiff. It is clear that the evidence was admissible; and I cannot understand how the defendants could be prevented from giving it unless by reason of some estoppel. An estoppel, however, can only arise out of some mutuality between the parties; but here the defendants are mere strangers. If such evidence were not admissible, the allegation that the plaintiff was possessed as of his own property, would become an idle averment, and the effect would be to destroy the distinction existing between trespass and trover.

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Rule absolute to enter a verdict for the defendants on the issues raised by the pleas of not possessed to the second count and new assignment thereon.

PERKINS v. VAUGHAN.

(4 Man. & G. 988—994; S. C. 5 Scott, N. R. 881; 12 L. J. C. P. 38; 6 Jur. 1114.)

1842.
Nov. 24.
[988]

In trespass by A. against B. for false imprisonment, B. justified on the ground that A. being possessed of a bill of exchange drawn by C. upon D., forged the acceptance of D. Issue being joined upon a replication *de injuriâ*, a witness called by A. proved that A. and B. went with him to D. on the day following that on which the bill had been dishonoured, when B. reminded D. that D. had on the presentment of the bill for payment stated that A. had forged D.'s acceptance, and that D. neither admitted nor denied that he had made such a statement. A witness called by B. stated that D., when he dishonoured the bill, did say that the acceptance was forged by A. Held, that this statement was admissible in evidence in mitigation of damages.

Semle, that this statement would have been evidence for B., even if evidence of the subsequent conversation had not been given by A.

TRESPASS for assaulting the plaintiff and compelling him to go to a police station-house, and thence to a police court, and imprisoning plaintiff twelve hours.

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Pleas: first, not guilty; secondly, leave and licence; thirdly, that before the committing of the trespasses, to wit, on the 14th of September, 1841, the plaintiff *having in his possession a bill of exchange, the tenor whereof was and is as follows: "15l. ETON, September 14th, 1841. Two months after date pay to my order 15l. for value received. ROBERT PERKINS. To Mr. JOHN DREWETT, 25, Bucklersbury, London;" he the plaintiff did feloniously forge on the said bill a certain false and counterfeit acceptance of the said bill, by writing on and across the said bill; which false, forged, and counterfeit acceptance of the said bill was and is as follows: "Accepted, JOHN DREWETT;" with intent to defraud the defendant, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown, and dignity; wherefore the defendant well knowing the plaintiff to be guilty of the said felony, did, at the said time when &c., give the plaintiff in charge to one Lawrence Anderson, then being a police and peace officer of our lady the Queen, duly authorised in that behalf, and then requested the said L. A., so being such police and peace officer, to take the plaintiff into his custody, and safely keep him, and carry, and convey him before some police magistrate and justice of the peace of our said lady the Queen duly authorised in that behalf, to answer the premises and to be dealt with according to law; wherefore the said L. A., so being such police and peace officer, did, at the request of the defendant, take the plaintiff into his custody, and forced and compelled him to go in and along the said public streets to the nearest police station-house, being the said police station-house in the declaration first above mentioned, in order there to enter the said complaint and charge against the plaintiff concerning the premises, and there safely to keep and imprison the plaintiff until the plaintiff could be conveniently conveyed and carried before some police magistrate or justice of the peace of our lady the Queen duly authorised in that behalf, to answer the premises; *and because there was not then at the last mentioned police station-house a proper police officer in that behalf ready and willing to take the charge against the plaintiff, and because the plaintiff could not be then and there conveniently kept and imprisoned as aforesaid, the said L. A. then being such police and peace officer as aforesaid, at the request of the defendant then forced and compelled the plaintiff to go from and out of the last mentioned police station-house into the public street, and forced him to go in and along divers other streets to a certain other police

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station-house, being the police station-house in the declaration secondly above mentioned, in order there to enter the said complaint and charge against the plaintiff concerning the premises, and there safely to keep and imprison the plaintiff until the plaintiff could be conveniently conveyed and carried before some police magistrate or justice of the peace of our said lady the Queen duly authorised in that behalf, to answer the premises; and the said L. A., then being such police and peace officer as aforesaid, at the request of the defendant afterwards and as soon as conveniently could be, conveyed and carried the plaintiff in and along divers other streets to a certain police court, before J. R. Esq., then being a police magistrate and justice of the peace then acting and duly authorised to act in that behalf, for examination concerning the premises, and to be dealt with according to law; which are the same, &c.: verification.

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A fourth plea differed from the third in stating that the plaintiff uttered the bill, knowing the acceptance to be forged, instead of alleging that it was forged by the plaintiff.

The plaintiff added the *similiter* to the first plea, and took issue upon the other pleas, by traversing the leave and licence in the second, and by replying *de injuriâ* to *the third and fourth. To these three traverses the *similiter* was added on the part of the defendant.

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At the trial, before Maule, J., at the sittings at Westminster, in Easter Term last, the imprisonment was proved. A witness called by the plaintiff stated, upon his examination in chief, that the plaintiff and the defendant went with the witness to Dreweatt on the day following the dishonour of the bill; that the defendant, in the presence of the plaintiff, reminded Dreweatt that on the preceding day Dreweatt had charged the plaintiff with having forged the acceptance; and that Dreweatt neither admitted nor denied that he had made such a charge.

One Vaughan, a cousin of the defendant, who proved the dishonour of the bill, was asked what Dreweatt said at the time he refused to pay the bill. This question being objected to, the learned Judge overruled the objection, and Vaughan answered that Dreweatt then stated that the plaintiff had forged the acceptance.

A verdict having been found for the defendant upon the third issue,

Talfourd, Serjt. in the same Term, moved for a new trial on the ground that the question had been improperly allowed to be

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put. The only measure of damage in this case is, the amount of suffering and injury actually sustained, whatever the impression on the mind of the defendant may have been.

Channell, Serjt. in Trinity Term showed cause :

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The evidence was tendered and received, not to prove a forgery actually committed, but to lessen the damages. The statement of Dreweatt was a declaration accompanying an act done. It could not be a defence to this action that the defendant had reasonable ground to suspect that the plaintiff had forged Dreweatt's acceptance. *It was merely evidence in mitigation of damages. If when a bill is presented for payment to bankers they say that there are no effects, that is a declaration which may be given in evidence, as it accompanies the act of refusal. The statement made by Dreweatt was calculated to make a considerable difference in the amount of damages, and it would clearly have been admissible in evidence.

(CRESSWELL, J. : That would be on a totally distinct ground from being a declaration accompanying an act.)

The damages would be assessed upon the issue of not guilty ; and that is so, whether the general issue is pleaded alone or with special pleas. Any facts which go to show that the damages are less than the plaintiff seeks to recover are admissible upon the general issue. It cannot be said that the statement given in evidence was irrelevant to the matters into which the jury had to inquire.

Talfourd, Serjt., in support of the rule :

The plaintiff complains of the damage which he has sustained by the imprisonment, and not of the motives of the defendant. The defence which it was sought to set up by the alleged conversation was pleadable. Reasonable ground of suspicion might have been pleaded after an allegation, that a felony had been committed by some one.

(COLTMAN, J. : That allegation could not have been made in this case.

MAULE, J. : There was no ground for supposing that any other person had committed the felony. That shows that the defence could not have been pleaded. Part of my brother *Channell's* argument is therefore left unanswered.)

The plaintiff had no means of cross-examining the witness upon this statement, nor could he anticipate that any such statement would be attempted to be proved.

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(MAULE, J. : Your objection would exclude a statement made by the defendant himself at that time.

TINDAL, Ch. J. : Facts cannot *be given in evidence which might have been pleaded.) [*993]

It was formerly supposed that circumstances of suspicion might be given in evidence.

(MAULE, J. : Pleas of justification are not drawn so as to enable the party to be put upon his trial as upon an indictment. A felony is not laid to have been committed against the peace.)

That is no doubt generally so; but here it is so drawn. The plaintiff contends that the evidence is not relevant, and that supposing it to be so, it is *res inter alios acta*.

TINDAL, Ch. J. now delivered the judgment of the COURT :

This was an action of trespass and false imprisonment, in which the defendant pleaded, first, not guilty ; secondly, leave and licence ; thirdly, that the plaintiff had forged an acceptance of a bill of exchange, and that the defendant had caused the plaintiff to be arrested upon that charge. The jury having found a verdict for the defendant on the third issue, the plaintiff obtained a rule to show cause why there should not be a new trial, on the ground of the admission of improper evidence.

The evidence objected to was this. One Vaughan was called by the defendant to prove the dishonour of the bill when presented for payment to Dreweatt, on whom the bill was drawn, and who appeared on the face of the bill to have accepted it ; and this witness stated that he accompanied the defendant to Dreweatt's, and that Dreweatt refused to pay the bill ; whereupon the witness was asked what Dreweatt said at the time of the refusal. It was objected by the plaintiff's counsel that such question could not be put to the witness ; but the objection being overruled, the witness answered that Dreweatt said, in effect, that the acceptance in his name was a forgery by the plaintiff. The only point that has been argued before us is, whether the question was a proper question, and one

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which ought to have been allowed *to be put to the witness. And we are of opinion that, upon the course which the evidence took on the trial of this case, the question was very properly allowed, and that the answer was admissible evidence in the cause. Even if the inquiry before us had depended on the determination of the point whether evidence by the defendant of the dishonour of the bill and of the circumstances attending such dishonour, was relevant to the question then before the jury of the acceptance by the plaintiff, it would have been difficult altogether to exclude such evidence on the score of its irrelevancy; but upon the trial the plaintiff had made it part of his own evidence; and his first witness had proved, on his examination in chief, that the plaintiff and the defendant went with him to Dreweatt's on the day following that of the dishonour of the bill, and that the defendant, in the presence of the plaintiff, reminded Dreweatt of the charge of forgery which he had made against the plaintiff the day before, and had asked him to repeat his conversation; and the plaintiff's witness proceeded to state Dreweatt's answer, which neither admitted nor expressly denied that such conversation had taken place. In this state of the evidence it was certainly competent to the defendant to prove by his own witness, who was present at such conversation, what had really taken place between Dreweatt and the defendant, and that the conversation was such as the defendant had stated in the presence of the plaintiff. The plaintiff's object was, to lead the jury to believe that the defendant had referred to a fictitious conversation. It was perfectly competent, therefore, to the defendant to show, on his part, that such conversation was real and not fictitious, and to follow up the plaintiff's account with his own.

Upon this ground we are of opinion that the question was properly allowed, and that the answer was properly admitted as evidence, and that the rule must be discharged.

Rule discharged.

JOHN HAMPDEN GLEDSTANES *v.* THE RIGHT
HONOURABLE JOHN WILLIAM, EARL OF SAND-
WICH AND JOHN WISBY (1).

1842.
Nov. 25.
[995]

(4 Man. & G. 995—1030; S. C. 5 Scott, N. R. 689; 12 L. J. C. P. 41.)

Grants from the Crown may be avoided upon three grounds:

First. Where the Crown professes to give a greater estate than it possessed in the subject-matter of the grant;

Secondly. Where the same estate, or part of the same estate, has already been granted to another;

Thirdly. Where the Crown has been deceived in the consideration expressed in the grant.

In 1594, Queen Elizabeth, by letters patent, granted the manor of Dale in reversion to A. for twenty-one years, to expire in 1646, at a rent of 26*l.* 13*s.* 4*d.* In 1624, James I. by indenture demised the manor, without any reservation of rent, to B. and C., trustees for Prince Charles, for ninety-nine years, to expire in 1722. In 1626 B. and C. demised the manor to D. for thirty-one years from the expiration, in 1646, of the term granted to A. at the same rent. 29th March, 1628, B. and C. assigned to D. the residue of their term of ninety-nine years, at the same rent of 26*l.* 13*s.* 4*d.* till the expiration of the existing leases (in 1677) and from that time at the rent of 40*l.* 2nd July, 1628, Charles I., by letters patent, confirmed the former leases to D. for a valuable consideration, and granted the reversion of the manor to E. in fee, to be held of the Crown by knight's service and without any rent during the residue of the term for ninety-nine years (ending in 1722) and from that time at a fee farm rent of 40*l.*: in which letters patent there was a clause releasing all the rent, made payable by the indenture of 1624. In 1664, Charles II., by letters patent, granted to F. in tail male, "all that yearly rent of 26*l.* 13*s.* 4*d.*" by the letters patent of Charles I., of 2nd July, 1628, to the King, "his heirs and successors," reserved, or mentioned to be reserved, out of the manor of Dale.

Held, that although there was a misdescription in this grant to F.,—inasmuch as the rent of 26*l.* 13*s.* 4*d.* was reserved by the letters patent of Car. I. for a term and not in fee, yet, as there was a rent of 40*l.* thereby reserved in fee,—the Crown had a sufficient estate in a rent, both as to interest and value, out of which the intention of the grant might be carried into effect; and, therefore, that such misdescription did not avoid the grant.

In 1798 the rental books of the entailtees were destroyed by fire, from which time they had been in the perception of a rent of 26*l.* 13*s.* 4*d.* paid by the tenants of the manor.

Held, that in the absence of any evidence that the rent commenced at that period, it was a legitimate inference that it had been paid from the period when it would become payable to the entailtees under the patent of Car. II.

In 1723 G. (claiming under E.) conveyed the manor to H. by a deed, which contained a covenant against incumbrances, with an exception "of a fee farm rent payable to the Crown."

Held, that this covenant (coupled with the statement of the rents in the

(1) Distinguished in *Great Eastern Ry. Co. v. Goldsmid* (1884) 9 App. Ca. 927, 941, 54 L. J. Ch. 162.—A. C.

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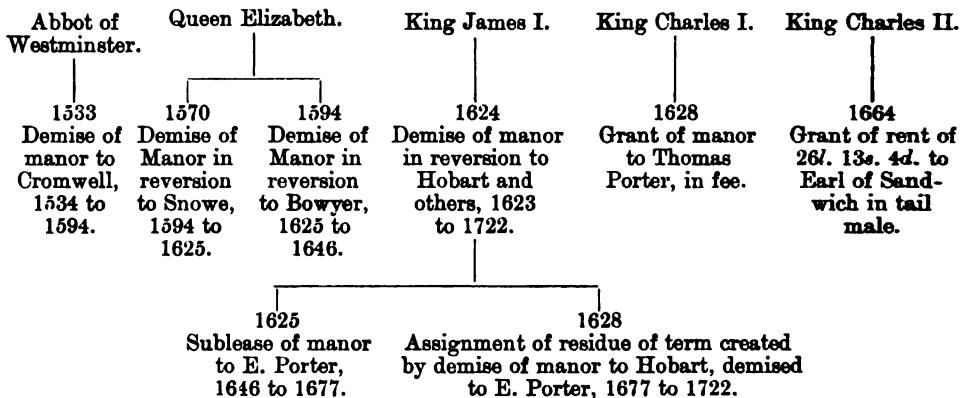
demises to D. and the grant to E.) showed that the owner of the manor had express notice of the existence of the rent.

Held also, that there having been so long a perception of rent in the entailles, and the owners of the manor having had notice of the reservation of a rent to the Crown, every intendment was to be made in favour of the grant to F.

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REPLEVIN. The defendants avowed and made cognizance, first under a distress for a fee farm rent claimed to be issuing out of the manor of Allfarthing, in the parish of Wandsworth, in the county of *Surrey, whereof it was alleged that the said Earl of Sandwich was seised in fee; and, secondly, under a distress for a fee farm rent, claimed to be issuing out of the same manor, alleged to have been granted by King Charles the Second, as in the avowry and cognizance particularly mentioned (1); and, issue having been joined upon the pleas in bar taking issue thereon, the following case was by the order of the Right Honourable Mr. Justice ERSKINE, and by the consent of the parties, stated for the opinion of this Court.

STEMMA TITULI.



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— February, 25 Hen. VIII. 1533 (1534). By an indenture of this date, under the conventual seal of the late monastery of St. Peter at Westminster, the said manor was demised to Thomas Cromwell, Knight, for the term *of sixty years, beginning from the Feast of St. Michael the Archangel then next ensuing.

25th July, 12 Eliz. 1570. By letters patent of this date, the said manor was granted in reversion to Elizabeth Snowe for the term of thirty-one years, beginning from the expiration, surrender, forfeiture or determination of the prior demise to Cromwell (2).

12th April, 36 Eliz. 1594. By letters patent of this date, the

(1) *Vide post*, in the judgment, p. 742. two grants of Elizabeth in the judgment, p. 743.
(2) See further particulars as to the

said manor was granted to John Bowyer for the term of twenty-one years, to begin from the expiration, surrender, forfeiture, or determination of the former grant to Elizabeth Snowe (1).

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15th June, 22 Jac. I. 1624. By an indenture of this date, made between his Majesty (King James I.) of the one part, and Henry Hobart, Knight and Baronet, Chief Justice of the Court of Common Pleas, and Chancellor of the Prince of Wales, James Fullerton, Knight, then Master of the Wards and Liveries, John Walter, Knight, then Attorney-General, and Thomas Trevor, Knight, then Solicitor-General, of the other part; his said late Majesty, of his special grace, certain knowledge, and mere motion, and at the request and nomination of Charles then Prince of Wales, did give, grant, and to farm let to the said Henry Hobart, James Fullerton, John Walter, and Thomas Trevor (*inter alia*), the said manor with the appurtenances, therein particularly mentioned to be of the yearly rent and value (beyond reprises) of 25*l.* 3*s.* 3*d.*, and to have been parcel of the possessions of the late monastery of Westminster, and afterwards annexed to the honour of Hampton Court, for the term of ninety-nine years from the Feast of St. Michael the Archangel then last past before the date of the said indenture.

8th March, 1 Car. I. 1628. By an indenture of *this date, between the said John Walter, James Fullerton and Thomas Trevor (who had survived the said Henry Hobart) of the one part, and Endimion Porter, Esq., one of the Grooms of the Chamber, of the other part, the said manor was by Walter, Fullerton and Trevor, granted in reversion to the said Endimion Porter for the term of thirty-one years, beginning from the Feast of St. Michael the Archangel, 1646, or from the end, surrender, forfeiture, or determination of the term then existing (2).

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29th March, 4 Car. I. 1628. By indenture of this date, made between the said John Walter, James Fullerton and Thomas Trevor of the one part, and the said Endimion Porter of the other part, the said John Walter, James Fullerton and Thomas Trevor, by the special warrant of his Majesty (King Charles I.), and by the direction of James, Earl of Marlborough, High Treasurer of England, and others the Commissioners authorised for the sale of lands, and in consideration of the yearly rent in and by the now stating indenture reserved, and thereout to be paid by the said Endimion Porter, his executors, administrators and assigns, and in consideration of a

(1) See further particulars as to the two grants of Elizabeth in the judgment, p. 743.
(2) *Vide post*, in the judgment, p. 743.

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competent sum of money by the said Endimion Porter to the use of his said late Majesty paid, and for divers other good causes and considerations, the said John Walter, James Fullerton and Thomas Trevor did give and grant to the said Endimion Porter, the said manor of Allfarthing, with the appurtenances, and all the right, estates, title, interest, term of years to come, reversion and reversions, claim and demand whatsoever of them the said John Walter, James Fullerton and Thomas Trevor, and every of them, of, in and to the said manor, except as by the said now stating indenture is excepted: to have and to hold the same unto *the said Endimion Porter, his executors, administrators and assigns during the residue of the said term of ninety-nine years; yielding and paying therefore yearly, during all the residue of the said term, to the said John Walter, James Fullerton and Thomas Trevor, their executors, administrators and assigns, to the use of his said late Majesty, his heirs and successors, the yearly rents following, that is to say, during all the term then to come and unexpired of and in the said letters patent of 12th of April, 36 Eliz., and the indenture of demise of 8th of March, 1 Car. I., or either of them, the yearly rent of 26*l.* 18*s.* 4*d.*; and after the expiration of the term aforesaid, then yielding and paying during all the residue of the said term of ninety-nine years, then to come and unexpired, the yearly rent of 40*l.*, at the Feasts of St. Michael the Archangel, and the Annunciation of the Blessed Virgin Mary, by equal and even portions, into the hands of the receiver of the revenues of the Prince of Wales, or the receiver of the county of Surrey, for the time being (1).

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2nd July, 4 Car. I. 1628. By letters patent of this date, after reciting the indenture of 15th of June, 22 Jac. I., and also reciting that the said John Walter, James Fullerton and Thomas Trevor (who had survived the said Henry Hobart), were possessed, by virtue of the demise contained in the said indenture of the 15th of June, 22 Jac. I., of, amongst other things, the said manor, by right of accruer, for the whole residue of the said term of years then to come and unexpired, and also reciting that by a certain indenture, bearing date the 29th day of March, then last past, made between the said John Walter, James Fullerton and Thomas Trevor of the one part, and the said Endimion Porter of the other part, the said John Walter, James Fullerton, and Thomas *Trevor, by the special warrant of the said late King, and by the direction of James, Earl of Marlborough, the said late King's Treasurer of England, and

(1) *Vide post*, in the judgment, p. 744.

other the Commissioners authorised for the sale of lands, and in consideration of the annual rent, in and by the same indenture reserved, and from thence payable and to be paid, by the said Endimion Porter, his executors, administrators, and assigns, and also in consideration of a competent sum of money, by the said Endimion Porter, for the use of the said late King, paid, and for divers other good causes and considerations the said John Walter, James Fullerton, and Thomas Trevor thereunto moving, granted and assigned to the aforesaid Endimion Porter the said manor of Allfarthing, with the appurtenances, and all the right, estate, title, interest, term of years to come therein, reversion and reversions, claim and demand whatsoever, of them the said John Walter, James Fullerton, and Thomas Trevor, and either of them, of, in and to the said manor, with its rights, members and appurtenances whatsoever, and of, in and to whatever is part and parcel thereof; except as by the said last recited indenture is excepted, which manor, it is by the now stating letters patent alleged, had been demised, by indenture, under the conventual seal of the late monastery of St. Peter's at Westminster, bearing date the last day of February, in the twenty-fifth year of the reign of the Lord Henry, late King of England, the Eighth, to Thomas Cromwell, Knight, for a term of sixty years, beginning from the Feast of St. Michael the Archangel, then next following; and had been afterwards granted, in reversion, to one Elizabeth Snowe, by letters patent, of the late Queen Elizabeth, bearing date at Gorhambury, the 25th day of July, in the twelfth year of her reign, for a term of thirty-one years, to begin from the expiration, surrender, forfeiture or determination *of the former lease, so made to the said Thomas Cromwell, Knight, and had been afterwards granted in reversion to John Bowyer, by letters patent of the said Queen Elizabeth, dated the 12th day of April, in the thirty-sixth year of her reign, for a term of twenty-one years, beginning from the expiration, surrender, forfeiture or determination of the former letters patent, made to the said Elizabeth Snowe; and then lately granted in reversion to the said Endimion Porter, by indenture of the said John Walter, James Fullerton and Thomas Trevor, dated the 8th day of March, in the first year of his then Majesty's reign, for a term of thirty-one years, beginning from the Feast of St. Michael the Archangel, 1646, or from the end, surrender, forfeiture or determination of the term then being, which should first and next happen; to have and to hold the said manor, with its appurtenances, to the said Endimion

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Porter, his executors, administrators and assigns, during the residue of the said term of ninety-nine years before mentioned, and then to come and unexpired; yielding and paying annually during the whole residue of the said term thence to come, to the said John Walter, James Fullerton and Thomas Trevor, their executors, administrators and assigns, for the use of the said late King Charles I., his heirs and successors, the annual rent following; (that is to say), for and during the whole term thence to come and unexpired, of and in the aforesaid letters patent and indenture of lease aforesaid, or either of them, the annual rent of 26*l.* 13*s.* 4*d.*; and, after the expiration of the term aforesaid, then yielding and paying during the whole residue of the said term of ninety-nine years then to come and unexpired, the annual rent of 40*l.* at the Feasts of St. Michael the Archangel and the Annunciation of the Blessed Virgin Mary, by even and equal portions, into the hands of the receiver of the said rent, appointed *by the said late King Charles I., when he was Prince of Wales, or to his said Majesty's receiver of the said county of Surrey, for the time being, the said late King Charles I., of his special grace, certain knowledge and mere motion, the said indenture, bearing date the aforesaid 29th day of March, to the said Endimion Porter, as is set forth, and all and singular grants, assignments, thing and things whatsoever, in the same mentioned and contained, approving and the same allowing and granting, and every of them, and the said manor and all and singular other the premises, under the rents, covenants, conditions and agreement and during the term, in the said indenture specified, to the said Endimion Porter, his executors, administrators and assigns, for his said late Majesty King Charles I., his heirs and successors; the said late King ratified and confirmed, by the now stating letters patent, and as well to the said Endimion Porter, his heirs, executors, administrators and assigns, and every of them, all and singular the premises, as also the said annual rent, in and by the said indenture, and (1) by the late King James I., as it is set

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(1) The word "and" is not in the original. The passage runs thus:

"Ac tam p'dict. Endimion Porter heredes executores administratores & assignat. suos & queml't eor. qm omia & singula p'missa tam de omibz annuat. reddit. in ac p. p'd'cam inden- tur. p. p'dem prem nrm sic p'fert. fact. reservat. qm de omibz arreragijs inde & de omibz sectis impetiçoiibz & de-

maund. p'inde relaxam'. acquietam. & exon'am'. p. p'sentes; nolentes p'd Endimion Porter, heredes executores administratores vel assignat. suos vel eor. aliquem p. dict. reddit. vel aliquibz arreragijs inde aliquatit. inquietari p'sequi seu molestari."

Vide post, in the judgment, pp. 745, 746.

forth made payable, as all arrears thereof, and all suits, claims and demands thereupon, the said late King Charles I. thereby released, acquitted and discharged; and by the now stating letters patent the said King Charles I., as well as in consideration of the sum of *300*l.*, by the said Endimion Porter, paid to his said late Majesty, as also at the humble petition, requisition and nomination of the said Endimion Porter, and of the said late King's special grace, certain knowledge and mere motion, did give and grant, and for himself, his heirs, and successors, to Thomas Porter, of London, Esquire, his heirs and assigns for ever, his said late Majesty's reversion and reversions, remainder and remainders whatsoever of the said manor of Allfarthing, and all and singular other the premises, by the said indenture, by the said John Walter, James Fullerton and Thomas Trevor granted and assigned, or by the same indenture mentioned to be granted and assigned, with their rights, members, liberties and appurtenances whatsoever; also all that the said late King's demesne or manor of Allfarthing, with the appurtenances, except as therein excepted: to have and to hold the same (except as excepted) to the said Thomas Porter, his heirs and assigns, to the only proper use and behoof of him, the said Thomas Porter, his heirs and assigns for ever; to be held of the said late King, his heirs and successors, as of his said late Majesty's house of Hampton Court, by knight's service; (that is to say), by the service of half a knight's fee and without any rent or other thing to be rendered to the said late King, his heirs or successors, during the residue of the said term of ninety-nine years; and after that term is finished, rendering annually to the said late King, his heirs and successors, out of and for the aforesaid demesne or manor of Allfarthing and other the premises thereby granted, 40*l.* into the hands of the bailiffs or receivers of the premises, for the time being, or into the receipt of the Exchequer of the said late King, his heirs or successors, at the Feasts of St. Michael the Archangel and the Annunciation of the Blessed Virgin Mary, by equal portions, to be for ever; the first payment of the said rent to begin at such feast or feasts *aforesaid as should first and next happen, after the expiration or other determination of the said term of ninety-nine years, by the said late King James I., by the said indenture bearing date the 15th day of June in the twenty-second year of his reign, of England, abovesaid, mentioned to be granted, and not before, for and instead of all other rents, services, exactions and demands whatsoever, from thence to the said late King Charles I., his heirs

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or successors, in any manner to be rendered, paid or performed. And that so often as it should happen that the said annual rent of 40*l.* above, by the now stating letters patent, reserved, should be in arrear, and not paid in part or in the whole by the space of forty days next after any of the said feasts, in which it is stated it ought to be paid, that then, from time to time, it should be lawful for the said late King Charles I., his heirs and successors, by the receiver of the premises, for the time being, or his deputy or any others for the time being, in the said demesne, manor and other the premises, or any part or parcel thereof, to enter and distrain, and the distresses there found, or to be found, to take and retain, so that the late King Charles I., his heirs and successors, of the said late King's said rent, together with all arrears thereof (if any there should be), should be fully satisfied and paid; and so often as it should happen that the said annual rent, by the now stating indenture reserved, should be in arrear, and not paid for one month after the end of the said forty days, for the payment thereof limited, that then and so often the said Thomas Porter, his heirs and assigns, should forfeit and pay to the said late King Charles I., his heirs and successors, 8*l.* (in the name of a penalty) over and above the aforesaid annual rent, by the now stating letters patent reserved, for each month from thence next following, in which the said annual rent, or any parcel thereof, had been in arrear and unpaid, *in the manner and form aforesaid; and that from thence afterwards, from time to time, and so often as such cases should happen, it should be lawful for the said late King Charles I., his heirs and successors, by the receiver of the premises of the said late King, his heirs or successors, for the time being, or his or their deputy for the time being, into the said demesne or manor, or into any part or parcel thereof, to enter and distrain, and the distresses there found, or to be found to take and retain, so that the said late King Charles I., his heirs and successors, the said rent and all arrears thereof, and all forfeitures and sums of money (in the name of penalty) to be forfeited, should be fully satisfied and paid.

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3rd February, 15 Car. II. In letters patent of this date is contained as follows:

“The King to all to whom &c. Greeting. Knew ye, that for and in consideration of the good, true, and acceptable service to us, by our beloved and faithful cousin and counsellor, Edward, Earl of Sandwich, heretofore rendered, and for the better support of the said Earl, his family and dignity, and for divers other goods,

causes, and considerations, us at this present, specially moving, of our special grace and of our certain knowledge and mere motion, we have given and granted, and by these presents do for ourselves, our heirs and successors, give and grant unto the said Edward, Earl of Sandwich, and the heirs male of his body, lawfully begotten, all &c., and all that yearly rent of 26*l.* 13*s.* 4*d.* by certain letters patent of our said father, under his Great Seal of England, bearing date the 2nd day of July, in the fourth year of his reign, made to Thomas Porter of London, Esq., to our said father, his heirs and successors, issuing or reserved or mentioned to be reserved, out of or for all that lordship or manor of Allfarthing, in the parish of Wannesworth, in the county of Surrey aforesaid, *with all its rights, members and appurtenances, and out of or for all other lands, tenements and hereditaments whatsoever, and every part thereof, chargeable with the said annual rent or fee farm of 26*l.* 13*s.* 4*d.*, by the aforesaid letters patent of our said late father above mentioned, to the same Thomas Porter, his heirs and assigns, for ever granted or mentioned to be granted, or out of, or for any of the premises alone, or together with any lands, tenements, rents and hereditaments, in the letters patent above mentioned contained; and all and all manner of fealties, tenures and services of the premises above mentioned, by the said letters patent before mentioned to be granted, and of every part thereof, or by which they, or any part thereof, are or is held of us; to have, hold and enjoy, all and singular the said several yearly rents or fee farms, of and for all and singular the premises, by the aforesaid several letters patent as aforesaid reserved, and by these presents granted or mentioned to be granted; and all and all manner of fealties, tenures and services of socage, and all and singular the other premises expressed and specified, and by these presents granted or mentioned to be granted, with all their appurtenances, to the said Earl of Sandwich, and the heirs male of his body lawfully issuing, to the sole and proper use and behoof of the said Edward, Earl of Sandwich, and his heirs male for ever; to be held of us, our heirs and successors, as of the manor of East Greenwich, in our county of Kent, by fealty only, in free and common socage, and not in chief, nor by knight's service, for all other rents, services, exactions and demands whatsoever for the same, to us, our heirs or successors, to be rendered, paid or made."

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No rent of 40*l.* has ever been put in charge to the Crown, in respect of the said manor; nor has any rent of 40*l.* ever been paid to or

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demand by, the Earls of Sandwich, or by any of them, either during the term of ninety-nine years, or since the expiration thereof.

In the ministers' accounts, in the office of the land revenue records, for the year 1624, 1 Car. I. is as follows :

“ The accounts of all and singular the bailiffs, farmers, provosts, collectors and other officers and ministers whomsoever of all and singular honours, castles, lordships, manors, lands, tenements, and other possessions and hereditaments whatsoever, of the King's Majesty in the county aforesaid, which were heretofore under the government or supervision of the late Court of Augmentation and Revenues of the Crown, and now,—as well by virtue of an Act of Parliament held in the first year of the late Queen Mary, as of a certain commission by the same Queen, by virtue of the same Act of Parliament, to William, Marquess of Winton, at the time Lord Treasurer of England, and Chancellor of the Court of Exchequer, directed,—to the same Court united and annexed, viz., reckoning from the Feast of St. Michael the Archangel, in the twenty-second year of our Lord James, by the Grace of God of England, France and Ireland, King, defender of the faith, &c., and of Scotland, the fifty-eighth, to the same Feast of St. Michael the Archangel thence next following, in the first year of our Lord Charles, by the Grace of God of England, Scotland, France and Ireland, King, defender of the faith &c., to wit, for the space of one whole year.

“ As below.

“ Manor of Chertsey, Hardwick, Egham and Thorpe, parcel of the possessions assigned to our lord King Charles before his accession to the Crown of the realm of England.

The late monastery of Chertsey. Of cccxxvi. xixs. xid. of rent and farm of the manor aforesaid, or of any other casual issues there, he doth not answer this year, because our lord King Charles, by his letters patent, sealed with the Great Seal of England,

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dated at Oxford, on the 12th day *of August in this first year of his Majesty's reign, gave and committed to certain Commissioners, in the same letters patent named, a Court for regulating, ordering, governing and disposing of all the revenues which he had before his accession to the Crown of England, of which revenues the aforesaid manors are parcel; and so the bailiffs, farmers and others compute the manors aforesaid, and they have been accounted for, before the aforesaid Commissioners, of the issues of the same, by virtue of the commission aforesaid;

“ Sum nothing.”

"Parcel of the possessions of the honour of Hampton Court.

"Allfarthing manor, in Wannesworth.

Neither doth he answer for 26*l.* 13*s.* 4*d.* of the farm, of all that lordship or manor of Allfarthing, in the parish of Wannesworth, late in the tenure of Thomas Cromwell,

Knight, because it is committed (*inter al.*) by certain letters patent of our lord King Charles, to certain Commissioners as parcel of his revenues, which he had before his accession to the Crown of England, as above, in the title of the manor of Chertsey &c.

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"Sum nothing" (1).

The entry in the ministers' account for the year 1641, 17 Car. I., relating to the manor of Allfarthing, is as follows :

"County of Surrey.—The accounts of all and singular bailiffs, collectors, provosts, farmers and others, officers and ministers whomsoever, of all and singular honours, castles, lordships, manors, lands, tenements and other possessions and hereditaments whatsoever, of the King's Majesty, in the county aforesaid, which were heretofore under the government or supervision of the late Court of Augmentations of the Crown, and now, as well by virtue of an Act of Parliament held in the first year of the late Queen Mary, as of a certain commission by the same Queen, by virtue of the said Act, to William, Marquess of Winton, at that time Lord Treasurer of England and Chancellor of the Court of Exchequer, united and annexed, being accountable, viz. from the Feast of Michael, in the seventeenth year of the reign of our Lord Charles, by the Grace of God of England, Scotland, France and Ireland, King, defender of the faith, &c., 1641, to the Feast of Michael thence next following, in the nineteenth year of the same lord the King, to wit, for the space of two whole years ;

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"As below.

"Manor of Batrichsey and Wannesworth and manor of Allfarthing, parcel of the honour of Hampton Court.

Of 151*l.* 12*s.* 0½*d.* per annum, for fee farm, or yearly rent, reserved, issuing or payable out of the manor of Wannesworth, with all its rights, members and appurtenances, or of

26*l.* 13*s.* 4*d.*, for a like fee farm or rent, reserved, issuing or payable,

(1) This document was thus certified :

Office of Land Revenue Records and Inrolments,

22nd April, 1841.

T. R. FEARNSIDE,

Keeper of the Records.

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out of the manor of Allfarthing aforesaid, with its rights, members, and appurtenances, here he does not answer this year, because it is charged among the revenues of our lord the King, which he had before his accession to the Crown of the realm of England, of which the aforesaid two manors are parcel, and there now are answered to the use of our said lord the King and the Commonwealth (1); as among the same revenues more fully appears.

“Sum none” (2).

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The Protectorate was established in the year 1653, and from this period until the year 1660, 12 Car. II., *when the King returned, the ministers' accounts were discontinued. No accounts of the Crown revenues during the Protectorate are now in existence.

In the year 1660 the ministers' accounts were recommenced, and the entry in that year, relating to the manor of Allfarthing, is as follows :

“County of Surrey.—The accounts of all and singular bailiffs, farmers, provosts, collectors and other officers and ministers whomsoever, of all and singular honours, castles, lordships, manors, lands, tenements and other possessions and hereditaments whatsoever, of the King's Majesty, in the county aforesaid, heretofore being under the government or supervision of the late Court of Augmentations and Revenues of the Crown, and now, as well by virtue of an Act of Parliament, held in the first year of the late Queen Mary, as of a certain commission, by the same Queen, by virtue of the same Act of Parliament, to William, Marquess of Winton, then Lord Treasurer of England and Chancellor of the Court of Exchequer, directed to the same Court, united and annexed, viz. computing from the Feast of St. Michael the Archangel, in the eleventh year of the reign of our Lord Charles II., by the Grace of God of England, Scotland, France and Ireland, King, defender of the faith, &c., to the same Feast of St. Michael thence next following, in the twelfth year of the reign of the lord the King of England &c., to wit, for the space of one whole year ;

“As below.

“Parcel of the possessions of the honour of Hampton Court.

“The account of Thomas Porter, Esq., fee farmer there.

“Arrears, none.

“Sum none.

“Fee farm.

(1) Ad usum dicti domini regis et rei-publicæ.

certified by the Keeper of Records in the Office of Land Revenue Records &c.

(2) The document was also similarly

“ But he accounts for 26*l.* 13*s.* 4*d.*, issuing from a *fee farm of all that lordship or manor of Allfarthing, in the parish of Wannesworth *alias* Wandsworth, in the county aforesaid, with all its rights, members and appurtenances, late in the tenure or occupation of Thomas Cromwell, Knight, and now or late in the tenure or occupation of John Bowyer, or his assigns, so granted to the said Thomas Porter of London, his heirs and assigns in fee farm, for ever, by letters patent of our lord King Charles I., bearing date the 2nd day of July, in the fourth year of his reign, to hold of our said lord the King, his heirs and successors, as of the honour of Hampton Court, by knight's service, viz. by the service of half a knight's fee, yielding, at the Feasts of St. Michael the Archangel, and the Annunciation of the Blessed Virgin Mary, equally every year as above; as in the same letters patent, inrolled in Book XVIII. fol. 184, more fully appears.

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“ Sum xxvj*l.* xiijs. iiij*d.*.”

“ The amount of the charge aforesaid 26*l.* 13*s.* 4*d.*; from which is allowed for the stipend for the clerk of the auditor, writing this account for this year, 2*s.*, and there remains 26*l.* 11*s.* 4*d.*, which is charged in the accounts of the receiver.

“ And he is quit ” (1).

After the year 1660 the ministers' accounts were again discontinued, and they were never again resumed. From that time the accounts of the land revenues of the Crown have been kept in the form of rentals. There is no rental in existence in the Office of Land Revenue Records of an earlier date than the year commencing at Michaelmas, 1696; but the rentals exist, with few exceptions, from the year 1696, down to a period subsequent to the expiration of the term of ninety-nine years, created by *the indenture of the 15th of June, 22 Jac. I. The manor of Allfarthing is not in charge, in any of these rentals, either for the rent of 26*l.* 13*s.* 4*d.*, or for the rent of 40*l.*, or for any other sum.

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An annual rent of 26*l.* 13*s.* 4*d.*, issuing out of the manor of Allfarthing, has been paid to the Earls of Sandwich for many years past, by half yearly payments at Lady Day and Michaelmas, Old Style.

There is no evidence to show when the Earls of Sandwich commenced the receipt of such rent of 26*l.* 13*s.* 4*d.*

The rentals and stewards' books of the Earl of Sandwich of an

(1) This document was also similarly certified by the Keeper of the Records in the Office of Land Revenue Records and Inrolments. *Vide supra*, 733, n. (1).

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earlier date than 1798 were destroyed, by an accidental fire, at the mansion of the Earl of Sandwich in Huntingdonshire, some years since. The earliest rental now in existence is for the year 1798, in which the rent of 26*l.* 18*s.* 4*d.* is stated to have been received; and the same rent has been paid to the Earls of Sandwich, from that time, down to the 11th of October, 1837. The earliest receipt, in the possession of the plaintiff, is of the year 1814, and it is in the following form:

“Manor of Allfarthing, in Wansworth.

Received, the 7th day of April, 1814, of Lady Buckingham- shire, thirteen pounds six shillings and eight pence, being half a year's fee farm rent due to the Earl of Sand- wich, at Lady Day last, Old Style.	13	6	8	
	1	6	10	Land tax deducted.
	<hr/>			
	12	3	10	
	1	4	4	Property tax de- ducted.
	<hr/>			
	10	19	6	
				8 Acquittance.
	<hr/>			
	£11	0	2	

“JOHN LAWRENCE.”

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By indentures of lease and release, bearing date the 28th and 29th days of January, 1723, the release made between John Porter of the first part, the Honourable Richard Sutton and Catherine Sutton, spinster, of the second part, the Right Honourable Sir Robert Sutton, *Knight, and Richard Liddell, Esq., of the third part, and the Honourable Conyers Darcy, Robert Sutton, Esq. and Peniston Lamb of the fourth part; the said manor was conveyed to the said Sir Robert Sutton and Richard Sutton, and their heirs, to certain uses therein mentioned; and, in the covenant against incumbrances, the said manor is covenanted to be free from incumbrances, except certain sums therein stated to be charged thereon, amounting to the sum of 2,800*l.* in favour of the brothers and sisters of the said John Porter; and also except a fee farm rent of 40*l.* payable to the Crown, in respect of the same manor.

The manor has long since been dismembered.

On the 26th day of March, 1840, a distress was taken by the Earl of Sandwich, on the premises called Burntwood Cottage (which is, for the purpose of the present case, admitted to be within the said manor), for 58*l.* 6*s.* 8*d.* alleged to be due for two years' arrears of an annual fee farm rent, of 26*l.* 18*s.* 4*d.*, alleged to be

issuing out of and charged upon the said manor, ending on the 11th day of October, 1889, which distress the plaintiff admits to be of the value of 53*l.* 6*s.* 8*d.*

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If the Court shall be of opinion that the said manor of Allfarthing was not liable to the payment of an annual fee-farm rent of 26*l.* 13*s.* 4*d.*, to the said Earl of Sandwich, under the circumstances mentioned and set forth, in the above case, then judgment is to be entered for the plaintiff, by confession, or as the Court should direct; but if Court shall be of a contrary opinion, then judgment was to be entered for the defendants, by *nolle prosequi* or otherwise, as the Court shall direct.

The Court is to be at liberty to draw any conclusion or inference from the foregoing statement, that to the Court shall seem fit, in like manner as if the case were tried by a jury; and it is admitted that the respective documents annexed hereto and marked respectively with *the letters A. B. C. D. and E. (1), are true copies of the original instruments mentioned, or in part set forth, in the case, and that they are to be read or referred to by the Court, or by either of the parties, as and for such originals, and as if they had been incorporated at length in the case (2).

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The case was argued in last Easter Term.

Manning, Serjt. (with whom was *Sir T. Wilde*, Serjt.) for the plaintiff:

The question in this case will mainly turn upon the letters patent granted by King Charles I. to Thomas Porter (A.D. 1628) (3), and by King Charles II. to the Earl of Sandwich (A.D. 1664) (4). It is

(1) These were copies, in Latin, of the following documents:

A. Grant to Thomas Porter, 2nd July, 4 Car. I.

B. Grant of several fee farm rents to Lord Sandwich under the Great Seal, 3rd Feb. 15 Car. II.

C. D. and E. Copies of the ministers' accounts set out in the case. *Supra*, 732, 735.

(2) The following points were marked for argument on the part of the plaintiff.

"The plaintiff will contend that no rent of 26*l.* 13*s.* 4*d.* passed to the Earl of Sandwich by the letters patent of 15 Car. II.; and that if any such rent passed, the same passed for a term of years only, which has long since

expired."

On the part of the defendants, the points marked were as follows:

"The defendants will argue that, upon the facts disclosed in the special case, the Earl of Sandwich, at the time of the distress made, was seised of a rent of 26*l.* 13*s.* 4*d.* issuing out of the manor of Allfarthing, as mentioned in the pleadings in this cause; it being a legitimate presumption from these facts, either that the said Earl was seised in fee, as alleged in the first avowry and cognizance, or that he was seised in fee tail, as alleged in the second avowry and cognizance."

(3) *Ante*, p. 726.

(4) *Ante*, p. 730.

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submitted, on the part of the plaintiff, that the present Earl is not entitled either to a fee-farm rent, as claimed in the first avowry, or to a rent charge in tail, as claimed in the second.

There is clearly no pretence for the claim as to the *rent in fee. As to the rent in tail, the principal facts of the case are as follows: The first three demises by the Abbot of Westminster in 1534, and by Queen Elizabeth in 1570 and 1594, may be laid out of the question, as the terms thereby granted have expired. In 1624, King James I. demised the manor to certain trustees for a term of ninety-nine years, which would expire in 1722. In 1626 the surviving trustees granted the manor in reversion to Endimion Porter, for thirty-one years, commencing at Michaelmas, 1646 (when the last term granted by Queen Elizabeth would expire), and ending therefore in 1677. On the 29th of March, 1628, the trustees assigned the residue of the term of ninety-nine years (from 1677 to 1722), to the same Endimion Porter; and, by the indenture of assignment, the rent reserved was 26*l.* 18*s.* 4*d.*, during the term granted in 1626—ending in 1677; and 40*l.* after that time, during the residue of the term for ninety-nine years—ending in 1722. And then, on the 2nd of July, 1628, King Charles I., by his letters patent, in consideration of 800*l.* paid by Endimion Porter, granted the manor in fee to Thomas Porter, releasing the rent (1), during the residue of the term for ninety-nine years (ending in 1722), and reserving a rent-charge of 40*l.* from that time for ever. Thus it appears that the Crown was interested in three different rents, at three different periods, first, in the rent of 26*l.* 18*s.* 4*d.* down to the year 1677, which was reserved to the trustees; secondly, in the rent of 40*l.* from 1677 to 1722, also reserved to the trustees; and, thirdly, in the rent of 40*l.* from 1722, reserved to the Crown in fee. This being the state of things, in 1664, King Charles II., by his letters patent, granted to the Earl of Sandwich, in tail male, a yearly *rent of 26*l.* 18*s.* 4*d.*, thereby stated to have been reserved in the patent of Charles I. (A.D. 1628) to the King in fee. But no such rent was in fact reserved. It is not difficult to see how the mistake arose. In the ministers' accounts after the Restoration (A.D. 1660) (2), Thomas Porter, accounts as fee-farmer of the Crown, for 26*l.* 18*s.* 4*d.*, incorrectly described as issuing "from a fee-farm" of the manor of Allfarthing. The officers had fallen into an error in supposing that there was a fee-farm rent of that amount payable

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(1) *Vide post*, in the judgment, (2) *Ante*, p. 734.
 p. 746.

from Thomas Porter ; whereas the 26*l.* 13*s.* 4*d.* was a rent reserved in respect of the grant of a term. And hence the origin of the mistake in the grant of Charles II.

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The other side will probably contend for a presumption in favour of some other grant ; but such a presumption cannot be made in the face of the existing grant ; and such grant, having been made under a mistake, passes nothing, according to the principle laid down in *Alcock v. Cooke* (1). It was there held, that an immediate grant to A. in fee, under the seal of the Duchy of Lancaster, of property which was in the possession of B. under an unexpired lease from the Duchy for years (such lease not being recited in the grant), was void, notwithstanding there had been a user under the grant, from 1631 the date of that deed to 1760. That which is a sound rule with regard to the Duchy, holds equally with regard to grants by the Crown made of property held *jure coronæ*. And the same case establishes that the thing itself professed to be granted in this instance—namely, the rent in fee tail—could not pass by the description given of it in the letters patent of Charles II. BEST, Ch. J., in giving the judgment of the Court in that case, *says, “ We take it to be a principle of the common law of this country, that if the King makes a grant which cannot take effect in the manner in which it ought to take effect according to its terms, we must conclude that the King has been deceived in that grant, and, therefore, that the grant is void.” To apply that principle to the present case. The grant of King Charles II. is in these words : “ We give and grant unto the said Edward, Earl of Sandwich, and the heirs male of his body lawfully issuing, all that yearly rent of 26*l.* 13*s.* 4*d.* by certain letters patent of our said father &c., bearing date the 2nd day of July, in the fourth year of his reign, to Thomas Porter &c., made, issuing, or reserved &c. to our said father, his heirs and successors, out of or for all that lordship or manor of Allfarthing,” &c. But in the grant made by Charles I. in 1628, no rent of the amount of 26*l.* 13*s.* 4*d.* is reserved from Thomas Porter, but a rent of 40*l.*, which is not to commence till after the year 1722. The King, therefore, was deceived as to the amount and nature of the rent.

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(CRESSWELL, J. : The mistake seems to be in putting the sum of 26*l.* 13*s.* 4*d.* instead of 40*l.*)

That would assume that it was intended to grant a rent of 40*l.*

(1) 30 R. B. 625 (5 Bing. 340 ; 2 Moo. & P. 625).

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The defendants in their second avowry set up a grant of 26*l.* 13*s.* 4*d.*, parcel of 40*l.* But it is submitted that either the grant is void *in toto*, or it enures only as a grant of the rent of 26*l.* 13*s.* 4*d.*, which, by the assignment of 1628, and which expired in 1677, was reserved to trustees for the benefit of the Crown. No presumption ought to be made in favour of the creation of a fee-farm rent: Hargrave's note to Co. Litt. 143 b, n. (5).

Channell, Serjt., for the defendants :

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It must be admitted that the whole *onus* in this case lies upon the defendants. It is not in dispute that for many years past the Earls of Sandwich have received this rent of 26*l.* 13*s.* 4*d.* from the manor of Allfarthing. The proof *of this is not carried further back, it is true, than 1798, when the documents were destroyed by fire, but receipts for that sum are brought down from that time to 1837. On the other hand, the earliest receipt which the plaintiff is enabled to produce is in 1814. No receipt on the part of the Crown is shown either of the 26*l.* 13*s.* 4*d.* or of the 40*l.* Under these circumstances, every fair presumption will be made in favour of the rent which has been paid to the Earls of Sandwich for so long a period.

The term of thirty-one years, granted to Endimion Porter in 1626, would merge in the term of ninety-nine years granted to him in reversion by the deed of assignment of March, 1628.

(*Manning*, Serjt. admitted that would be so (1).

COLTMAN, J. : May there not be some doubt as to that? Can one term be merged in another?)

Perhaps it would be more proper to describe it as a re-union of the two estates than as a destruction of the former estate. There may be a question, perhaps, whether under that assignment of 1628, the rent of 26*l.* 13*s.* 4*d.* was to run on to 1646 (when the second term demised by Queen Elizabeth would expire) or to 1677 (when the first lease to E. Porter would terminate), for that rent is

(1) These were not two successive terms. The term of thirty-one years created in 1626 was a sublease made by persons holding for a term of ninety-nine years, and carved out of their estate. The sub-lessee might therefore surrender to his lessors, or his lessors might release to him their

reversion; in either case, the sublease would merge in the larger estate out of which it had been taken. If the conveyance of the 29th of March, 1628, operated as an assignment, the payments therein reserved as rent would be sums in gross. *Vide 5 Man. & Ry.* 157.

reserved "during all the term" in the said letters patent of Queen Elizabeth and the demise of Charles I., "or either of them;" but whether the rent of 40*l.* was to commence from 1646 or from 1677 is not very material. For the grant by Charles I. of July, 1628, to T. Porter in fee, recites the previous grant to E. Porter, and the *terms thereof, and releases the rents which E. Porter had to pay, reserving a rent of 40*l.* in fee after the expiration of the ninety-nine years in 1722. Then comes the grant by Charles II. of the rent of 26*l.* 18*s.* 4*d.* to the Earl of Sandwich, in tail, which could not commence till 1722. It is clear that the Crown intended to deal with some rent payable from T. Porter under the grant of July, 1628, for that grant is referred to in the letters patent; and that fact materially distinguishes the present case from *Alcock v. Cooke*. That was a grant in possession of property which was already in the possession of another by a previous grant, and it was held that this second grant was void, as it was inconsistent with the King's honour, that he should grant the right of possession in the same thing to two persons at the same time. The second grant in that case did not notice the previous lease, which, having been-enrolled, must have been in the knowledge of the second grantee; and therefore it was held that the King was deceived by him, and that the grant was void. No such objection exists in this case, and the Court will make every necessary presumption to give effect to the King's grant.

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Manning, Serjt., in reply :

The claim set up on the other side, is, for the rent of 26*l.* 18*s.* 4*d.* as parcel of the rent of 40*l.* But in that case what becomes of the residue 18*l.* 6*s.* 8*d.*, being one-third of the rent of 40*l.*? The Crown has never received it. The Court will not presume that a portion of the 40*l.* rent was granted, so as to render the tenant liable to two distresses instead of one. Charles II. granted an entire rent, *totum illum redditum*.

Cur. adv. vult.

TINDAL, Ch. J. now delivered the judgment of the COURT :

The question before us arises upon a special case *stated by consent of the parties under the order of my brother ERSKINE, and made after the proceedings on the record had gone on to the joining of issue on the pleas in bar in an action of replevin. The distress had been made for two years' arrears of an annual

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fee-farm rent of 26*l.* 13*s.* 4*d.*, alleged to be issuing out of the manor of Allfarthing, in the parish of Wandsworth and county of Surrey, and to have been due at Old Michaelmas, 1839.

The defendants in their first avowry and cognizance, claim it to be a fee-farm rent of 26*l.* 13*s.* 4*d.*, whereof the Earl of Sandwich was seised in fee. In the second avowry and cognizance they allege that King Charles I. was seised in fee of the manor of Allfarthing, subject to a term of ninety-nine years granted by King James I. to Sir Henry Hobart, Sir James Fullerton, Sir John Walter and Sir Thomas Trevor (which term had ended long before the said time when, &c.), and that King Charles I. granted to Thomas Porter, Esq., and his heirs, the reversion of the said manor, expectant on the determination of the said term of ninety-nine years, to hold by the service of half a knight's fee, and without rent, during the remainder of the term of ninety-nine years, and after that term rendering yearly to the King, his heirs and successors 40*l.*, out of the said manor of Allfarthing, at Michaelmas, and the Feast of the Annunciation, by equal portions, with a clause of distress; and they further allege, that afterwards, and before the expiration of the said term of ninety-nine years, King Charles II., by letters patent, dated the 4th February, in the fifteenth year of his reign, granted to Edward, Earl of Sandwich, and the heirs male of his body, the annual rent of 26*l.* 13*s.* 4*d.* of the said annual rent of 40*l.*, so by the said letters patent of Charles I. reserved as aforesaid, to the said King Charles I., his heirs and successors; to hold the said rent of 26*l.* 13*s.* 4*d.* to the said Edward, Earl of Sandwich, and the heirs male of his body, together with the said power of distress: and they then deduce the title of the present Earl, the defendant, to such rent, as heir male of the body of the said original grantee.

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Various pleas in bar were pleaded, to which it is unnecessary particularly to refer, as the broad question stated in the case, and which formed the principal ground of argument before us, was whether the Earl of Sandwich had established his right, either to a fee-farm of 26*l.* 13*s.* 4*d.* in fee, or to a rent of 26*l.* 13*s.* 4*d.* parcel of the annual Crown rent of 40*l.* in tail male, under the grant of Charles II., set out in the second avowry.

It may be advisable, before we consider the objections raised against the grant of King Charles II., to ascertain how long and under what circumstances the actual rent of 26*l.* 13*s.* 4*d.*, has been actually paid by the tenant for the time being of the manor, and

actually taken and enjoyed by the present Earl and his ancestors. And it appears from the statement in the case that at least from the year 1798, down to the time of the accruing of the arrears or which the distress was put in, that is, down to Old Michaelmas Day, 1837, an annual rent of 26*l.* 13*s.* 4*d.*, issuing out of the manor of Allfarthing, has been paid by the tenants of the manor and received by the Earls of Sandwich, by half-yearly payments at Lady Day and Michaelmas, in every year. This was proved by the earliest rental and steward's book in existence, viz., the book of the year 1798; and, as all the rentals and stewards' books of an earlier date are stated to have been destroyed by an accidental fire some years since at the mansion house of the Earl, we think the fair and necessary inference which a jury ought to have drawn, and would have drawn from those premises is, that the payment of the rent did not commence originally in 1798, but must have been a payment continued by the tenants of the manor to the Earls of *Sandwich, from some earlier period; there being nothing whatever to show any legal ground of its commencement in 1798, rather than any other year: and, as there is no period to which upon the facts stated in this case, a jury could reasonably assign the date of its commencement other than the year at which it would become payable to the Sandwich family, under the grant of Charles II., the inference is that it has been paid from that time, that is, at all events, if such grant is valid, and free from the objections which had been urged against it in argument; a point which we shall presently take into consideration.

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It further appears, from the special case, that the owners of the manor of Allfarthing, at all times had notice of the existence of an annual rent reserved out of the same manor to the Crown; that is, first, of the rent of 26*l.* 13*s.* 4*d.* payable for a term of years, and afterwards of the rent of 40*l.* reserved and payable in fee. The earlier leases set out in the special case do not, indeed, state what rents were reserved; but we have, since the hearing of the argument, with the consent of the learned counsel, received a certificate from the officers of the Rolls chapel, from which it appears that the rent reserved in the lease granted by Queen Elizabeth, in the twelfth year of her reign, to Elizabeth Snowe, and also in the reversionary lease granted by the same Queen, in the thirty-sixth year of her reign, to John Bowyer, was the annual rent of 26*l.* 13*s.* 4*d.*; and we have ourselves inspected the original indenture of the 8th of March, 1 Car. I., which was brought to us by the

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officers of the Duchy of Cornwall, from which it appears that Sir John Walter and the other lessees of the Crown, under the lease which had been granted to them in the fifteenth year of King James I. for ninety-nine years, as trustees for the then Prince of Wales, afterwards Charles I., demised to Endimion Porter for the term of thirty-one years, to commence in 1646, **“ under the antient yearly rent or sum of 26*l.* 13*s.* 4*d.*.”* We have also inspected the original indenture of the 29th of March, in the fourth year of Charles I., by which the same trustees, by the direction of Charles I., assign to Endimion Porter the whole of their interest in the term of ninety-nine years, at and under the yearly rent of 26*l.* 13*s.* 4*d.*, until the expiration of the then existing leases, that is, until the year 1677, and from that year until the determination of the said term of ninety-nine years, at and under the yearly rent of 40*l.* We think, therefore, there is express notice to Endimion Porter, and all claiming under him, during the continuance of those terms, of the existence of the reservation of those rents. And, when King Charles I., by his letters patent of the 2nd of July, in the fourth year of his reign, confirms those leases so granted to Endimion Porter, and in consideration of the 300*l.* by him paid, grants the reversion of the manor, after the determination of the said term of ninety-nine years, to Thomas Porter in fee, subject to the annual rent of 40*l.*, payable to the Crown for ever ; there is again express notice to Thomas Porter, and all claiming the manor under him, of the perpetual charge of a rent of 40*l.* ; indeed when John Porter, by indentures of lease and release of the 28th and 29th of January, 1723, (the year next after the expiration of the term of ninety-nine years), conveys the same manor of Allfarthing to the Sutton family, the covenant against incumbrances contains an express exception *“ of a fee-farm rent of 40*l.* payable to the Crown, in respect of the said manor.”*

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Under these circumstances, it is unnecessary to say that every intendment ought to be made to support the grant of a rent, which has been accompanied, on the one hand, with actual perception and enjoyment for so many years, and, on the other, with full notice to those who have become owners of the manor for the time being, *that a rent of 26*l.* 13*s.* 4*d.* was payable out of the manor to the Crown, or the Crown's grantee down to the year 1677 ; and that, from that period, the larger rent of 40*l.* was payable thereout to the Crown for ever.

Still the question arises, and must be determined, whether the

grant to the Earl of Sandwich is valid in point of law. It is objected, on the part of the plaintiff, that there is in that grant such mistake and misdescription, as to the subject-matter thereof, and as to the Crown's interest therein, that, upon the general rule of law applicable to the construction of the King's grants, it must be taken that King Charles II. was deceived in his grant; and consequently that the same is void.

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This question involves an inquiry into two points:—first, whether there is any and what mistake or misdescription in the grant; secondly, if mistake or misdescription exists, whether it is of such nature, character and quality, as will have the effect of avoiding the grant of the King.

The first inquiry can only be determined by investigating, from the documents referred to in the case, the exact state of the rent granted by the letters patent of Charles II., at the precise period of time when such grant was made, and by comparing such state of the rent with the terms of the grant itself.

Now, by referring to the documents which we have already mentioned, it will appear that the reservation of annual rents to the Crown out of the manor of Allfarthing stood thus: an annual rent of 26*l.* 13*s.* 4*d.* had been reserved by the Crown, under the demise granted by Queen Elizabeth in the year 1570, and the same annual rent had been continued under successive demises, either immediately or mediately, from the Crown, from that year down to the year 1677. From the year 1677, the annual rent of 40*l.* had been reserved by the indenture *of assignment, made by the trustees of the Crown to Endimion Porter, which latter rent continued to exist down to the year 1722; and from the latter year the annual rent of 40*l.* had been reserved to the Crown, in fee, under the letters patent of the 2nd July, 4 Car. I.

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But it will be proper to consider the operation and effect of those letters patent upon the rents reserved under the indentures of demise of the 8th of March, 1625, and the 29th of March, 1628: for, in the course of the argument, it seems to have been considered that such rents were, by those letters patent, released by the Crown.

By those letters patent, reciting the indenture under the Great Seal of the 15th of June in the 22 Jac. I., whereby the King demised to Sir Henry Hobart, Sir John Walter, and others, the manor of Allfarthing (amongst other premises), to hold for the term of ninety-nine years from Michaelmas then last past (which

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demise, by reference thereto, appears to have been made to them as trustees for the then Prince of Wales); and also reciting the indenture of the 29th of March then last past, made to the said Endimion Porter by Sir Thomas Walter and the other surviving trustees therein named, King Charles I. ratifies and confirms the said last-mentioned indenture, and all the matters therein contained, approving and accepting of the same and the premises therein mentioned, under the rents, covenants, conditions and agreements, and during the term in and by the said indenture specified: and the King then (according to the proper construction of the original letters patent, which accompany and form part of the case) releases the said Endimion Porter from all the rents reserved and made payable, “in and by the said indenture by the late King James I. made payable, and all arrears thereof;” and the King then, for the considerations therein mentioned, proceeds to grant the reversion *of the manor to Thomas Porter, in fee, under the reservation of the annual rent of 40*l.*, for ever. Under these letters patent, therefore, the rents reserved and mentioned in the indenture of the 29th of March then last past, continue in full force, and nothing is released to Endimion Porter but the rents, whatever they may be, which are reserved by the said indenture of lease of King James, a clause of release which could only have been introduced, *ex abundanti cautelâ*, in favour of the grantees of the Crown, as, in fact, upon reference to that indenture, no rents were reserved or made payable by the trustees to the Crown. Looking, therefore, at the general effect of all these grants, it appears that at the precise time of the execution of the grant by King Charles II. to the Earl of Sandwich, in 1664, the annual rent of 26*l.* 13*s.* 4*d.*, which commenced at least as early as the year 1570, was still in existence and payable out of the manor, and would continue in existence and payable, until the year 1677; and that the annual rent of 40*l.* payable out of the manor, in fee, would become payable to the Crown in the year 1677, but not before.

Now, the description of the rent in the letters patent of the 3rd of February, 15 Car. II., is this: “All that yearly rent of 26*l.* 13*s.* 4*d.* by certain letters patent of our said father, under the Great Seal of England, bearing date the 2nd of July, in the fourth year of his reign (to Thomas Porter, of London, Esq., made). to our said father, his heirs and successors, issuing or reserved, or mentioned to be reserved, out of or for all that manor or lordship

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of Allfarthing" (1). And, beyond all doubt, *upon comparing the terms of the grant with the state of the rent actually in existence and vested in the Crown at the time, there is between the two some variance and misdescription. Up to a certain point both well agree together. There was upon the 3rd of February, 1664, a rent of 26*l.* 13*s.* 4*d.* vested in the Crown, and issuing and reserved out of the manor or lordship of Allfarthing; and this rent, although not originally reserved by the letters patent of the 2nd of July, 4 Car. I., is yet a rent "reserved or mentioned to be (2) reserved" to the Crown in such letters patent; the indenture of 1628 being confirmed thereby, and such rent being made payable at the Exchequer for the use of the Crown. So far, therefore, the description in the grant may be held, as it appears to us, to agree with the real state of the King's title. But the difference between the two is this, that whereas such rent is described in the letters patent of Charles II. to have been reserved to King Charles I., his heirs and successors (3), in truth it was reserved for a term only, by those letters patent, namely, for a term which expired in 1677, after which it became an annual rent of 40*l.*, continuing down to the year 1722, and from that time an annual rent (4), of the same amount, for ever.

Such, therefore, being the exact state of the misdescription in the grant, the question arises whether it is of such nature, quality and character, as that, according to the decided cases, it must have the effect of avoiding the King's grant. If the rent issuing out of the manor of Allfarthing, which was vested in Charles II. at the time of making his grant, had been a rent of 26*l.* 13*s.* 4*d.* for the then residue of a term of years only, *and nothing more had been vested in the Crown, no doubt the grant would have been void. In that case, the King, by professing to grant an estate in fee-tail, in a rent which he held for a term of years only, would have professed to grant a larger estate than he had himself, and must be held to

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(1) *Ac tot. ill. annual. reddit. viginti et sex librar. tresdecim solidor. & quatuor denariar. legal. monet. Angl. p. quas. lras paten. dci patr. nri sub magno sigill. suo Angl. geren. dat. secundo die Julij anno regni sui quart. Thome Porter de London. Ar. confect. p'fat. patr. nro hered. & successoribz suis exeun. sive reservat. vel mentionat. FORE reservat. de aut p. tot. ill. domin. sive maner. de Allfarthing."*

(2) These English words are ambiguous; but the construction put upon them would appear to require "fuisse" instead of "fore" in the original. *Vide* preceding note.

(3) This description appears to be correct. A party seised in fee who demises for a term rendering rent, has a descendible interest in such rent.

(4) And fee-farm.

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have been deceived in making such grant. Such was the case of *Alton Woods* (1), and many other cases there referred to. But, in the case now before us, King Charles II. was not only possessed of the rent of 26*l.* 18*s.* 4*d.*, issuing out of the manor of Allfarthing for the residue of a term of years, but was also possessed of a rent of larger amount, namely, of the amount of 40*l.* per annum, issuing out of the same manor, commencing immediately on the expiration, or other sooner determination, of the former rent, and continuing for ever. And this larger rent the Crown might undoubtedly, by its prerogative, apportion and divide amongst different grantees, in such quantities and proportions as the Crown might think fit, without any attornment of the tenant of the land, or any other ceremony: Co. Litt. 148 a, 309 b. It is manifest, therefore, that King Charles II., at the time of his making the grant, was possessed of a rent issuing out of this manor, sufficient in quantity of estate, and more than sufficient in value, to satisfy the grant so then made to the Earl of Sandwich, in tail-male.

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And, upon consideration of the cases in which the King's grant has been held to be avoided by reason of any misdescription or mistake thereon, they will be found to fall under one of three classes; first, where the King has by his grant professed to give a greater estate than he had himself in the subject-matter of the grant; as in the case of *Alton Woods* and the other cases above considered; secondly, where the King has already granted the same estate, or part of the same *estate, to another; in which case the second grant would work injustice, or, at all events, great inconvenience; such was the case of *Alcock v. Cooke* (2), cited by the plaintiff in argument, and *The Earl of Rutland's case* (3); or, thirdly, where the King has been deceived in the consideration expressed in his grant; as where the consideration has been untruly stated, or the subject of the grant has been recited to be of less value than it really is, or where, as in the case of *Mead v. Lenthall* (4), the King recites a former grant of an office for life, and a surrender; and then grants the same office to J. S. whereas in truth, either the King had not granted the office for life, or the office had not been surrendered; here the grant would be void, because there was no such consideration as was recited.

The present case, however, stands manifestly clear from the

(1) 1 Co. Rep. 40.

(3) 8 Co. Rep. 57.

(2) 30 R. R. 625 (5 Bing. 340; 2 Moo. & P. 625).

(4) 2 Roll. Abr. 189.

grounds of objection which apply to the two latter classes; and we think it is equally distinguishable from the cases of the first description; for there appears to be nothing to prevent the intention of King Charles II., as expressed in his letters patent, from being carried into effect; for as those letters patent refer to the grant of the 4 Car. I., they make the terms of that grant part of the description of the subject-matter of the letters patent of Charles II. It is manifest, therefore, by reference to the former grant, that the King had sufficient estate in a rent, both in respect of interest and value, out of which the intention of the Crown might be satisfied and carried into effect; as in fact it has been satisfied and carried into effect from the time of the grant down to the present time. And we think the present case is to be governed by the principle laid down in the case of *Rex et Regina v. Kempe* (1), that where the King is not deceived in his consideration, nor otherwise to *his prejudice, by any suggestion on the part of the grantee, but the intent was to pass the interest expressed in the grant, only the King has been mistaken in the law (2), there he shall not be said to be deceived, to the avoidance of the grant. This doctrine is laid down by EYRE, J., in giving his judgment for the defendant, in the case above referred to; and HOLT, Ch. J., in giving his judgment also in favour of the defendant, expresses no dissent from the principle so laid down.

Upon the whole, therefore, we come to the conclusion that the manor of Allfarthing is still liable to the payment of the annual rent of 26*l.* 13*s.* 4*d.*, as claimed by the Earl of Sandwich in tail-male; and we therefore direct, under the agreement stated in the special case, that a judgment of *nolle prosequi* be entered on the record.

Judgment for the defendants (3).

(1) 1 Ld. Ray. 49.

(2) Here, the King, being entitled to the benefit of a rent of 26*l.* 13*s.* 4*d.* issuing out of a term, and of a rent of 40*l.* issuing out of another term, and being seised of a rent of 40*l.* expectant upon the determination of both terms, in fee, must be taken from the recitals to have been informed that he had one rent of 26*l.* 13*s.* 4*d.* The mistake in law would appear to consist in imagining that the rent of 40 pounds reserved by Charles I. was a rent of 40 marks, the amount reserved on former occasions where the grants were for a term only. The letters patent of Charles II.

grant forty-eight different rents to the Earl of Sandwich, and in the great majority of cases the subject granted is "rent or fee-farm;" but in that part of the grant which relates to a rent issuing out of the manor of Allfarthing, the words are *totum illum redditum de 26*l.* 13*s.* 4*d.**, not, as in other cases, *totum illum redditum vel feodi firmanam*, which seems to lead to the inference that the grant was of the rent of 26*l.* 13*s.* 4*d.*, and not of the fee-farm, or any part of the fee-farm, of 40*l.*

(3) It was advised that an application should be made for leave to turn

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(4 Man. & G. 1031—1048; S. C. 5 Scott, N. R. 781.)

Under an arrangement between A., a merchant at Manchester, and C., a merchant at Liverpool, A. bought goods for C. in A.'s name, and consigned them for sale in A.'s name, to houses in India, the correspondents of B. At the time of the arrangement and of the shipment of the goods, C. was the factor of B. at Liverpool (which fact was known to A.), and advised B. of the shipments, and as to the advances B. might make thereon to A. B. had from time to time accounted with A., and handed over to him the balance of the proceeds of each shipment, after deducting commission, &c. C. having become bankrupt, B. refused to pay over to A. the balance in his hands, claiming a lien thereon in respect of the debt due to him from C. on the ground that the goods were the property of C. and not of A., and alleging that the course of dealing between A. and C. was a fraud upon B. A. having brought an action for money had and received against B., the Judge left it to the jury at the trial to say; first, whether, as between A. and B., the goods were the property of A.; and, secondly, whether the transaction between A. and C. amounted to a fraud on B., which was productive of injury to the latter. The jury having found a verdict for A. for the amount of the balance in the hands of B., the Court refused to grant a rule nisi for a new trial.

ASSUMPSIT for money paid, money had and received, interest, and money found due upon an account stated.

Pleas; *non assumpsit*; and, secondly, payment; on which issue was taken by the replication.

At the trial, before Tindal, Ch. J., and a special jury at the sittings in London after Hilary Term last, the following facts appeared. The plaintiff is a merchant carrying on business at Manchester; and the defendants, Messrs. Crawford, Colvin, & Co., are merchants in London, and are the agents or correspondents of the houses of Remington & Co. of Bombay, and Colvin, Ainslie, Cowie, & Co. of Calcutta.

The plaintiff had been in the habit of buying, in his own name, goods on commission for a Mr. John Coupland, a merchant residing at Liverpool. About the year 1830 it was arranged between the plaintiff and Coupland that the former should purchase, on Coupland's account, large quantities of goods, to be shipped to Bombay and Calcutta through the house of Crawford, Colvin, & *Co.; and,

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the case into a special verdict, for the purpose of obtaining the opinion of a court of error as to whether a grant from the Crown was vitiated by a misdescription not falling within any of the three classes to which former cases of misdescription were reducible. See

The Earl of Kent's case upon a petition of right, H. 21 Edw. III. fo. 47, pl. 68. But the plaintiff, who had no personal interest, considered that, as a trustee, he would be justified in acquiescing in the judgment already pronounced.

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in pursuance of this arrangement, the plaintiff from time to time purchased goods under instructions received from Coupland, which were consigned in the plaintiff's name to Remington & Co. at Bombay, and Colvin, Ainslie, & Co. at Calcutta for sale on commission. The defendants made advances to the plaintiff on the goods so consigned upon the understanding that they were to be repaid such advances, and also their commission and charges for insurance, &c. out of the proceeds which were to be remitted to them from the houses in India; the balance to be transmitted to the plaintiff. Some shipments were also made of goods purchased by the plaintiff, and shipped on his own account, and others of goods bought by Coupland himself, and shipped in the name of the plaintiff; but in all the transactions the plaintiff appeared to be the shipper.

During the period covered by these transactions the defendants employed Coupland as their factor or agent at Liverpool, for which he received a commission. The invoices of the goods, consigned as above-mentioned, were made out in the plaintiff's name. When Coupland himself bought goods and shipped them in the plaintiff's name, he sent the invoices to the plaintiff, who copied them, and transmitted such copies to the houses in India; but Coupland gave instructions to the houses in India as to the sale and returns of the goods. Coupland also forwarded the bills of lading to the defendants, and advised them of the shipment, and instructed them as to the amount they might advance on each consignment. A separate account was kept of each shipment. The accounts sales and accounts current from the houses in India were rendered direct to the plaintiff; they were made out in his name, and he was always treated and considered as the *bonâ fide* owner of the goods shipped. The proceeds of sale were remitted on the plaintiff's account to the defendants, who, after deducting the advances *they had made, their commission, and the premiums of insurance and other charges, they handed over the balance to him, or, in case of a deficiency, which occasionally happened, the defendants claimed and received from the plaintiff the amount over advanced.

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The invoices of goods consigned in the plaintiff's name were headed: "Invoice of twenty casks of &c., shipped per *Fatima* to Calcutta, and consigned to Messrs. Colvin & Co. (or as the case might be) on account of David Scott, Esq."

The defendants, on receipt of the bill of lading and advice of

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shipment from Coupland, wrote to the plaintiff to the following effect :

“ SIR,—Under Mr. Coupland’s instructions this morning received, we pay to your credit with the Manchester Branch Bank 500*l.*, as our advance on your shipment of copper per *Fatima* ; and we insure as follows, &c.

(Signed)

“ CRAWFORD, COLVIN, & Co.”

The account sales of the goods rendered to the plaintiff by the houses in India were headed as follows : “ Account sales of thirteen casks of copper nails, &c., *ex Fatima*, sold by Colvin & Co. on account of David Scott, Esq.” The accounts current which accompanied the account sales were headed : “ Dr. — David Scott, Esq., in account with Colvin, Ainslie & Co.,—Cr.” The defendants, upon receipt of remittances from India, rendered accounts to the plaintiff of each shipment in the following form : “ Dr. — D. Scott, Esq., for — casks, &c. per *Fatima*,—Cr.”

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The whole or the greater part of the advances made by the defendants to the plaintiff were paid over by him to Coupland. On the 1st of January, 1836, a Mr. Duncan entered into partnership with Coupland, and the plaintiff continued to deal with Coupland and Duncan in the same manner until they became bankrupts in November, 1836. At the time of Coupland and Duncan’s *bankruptcy, Coupland owed the plaintiff about 5,600*l.*, and Coupland and Duncan were also indebted to him to nearly the same extent. Coupland was likewise indebted to the defendants in about 18,000*l.*

Besides the consignments made in the plaintiff’s name, Coupland employed other parties to make purchases for him, and made other shipments in the names of other parties, amongst whom were a Mr. Mallalieu and a Mr. Wood.

On the 28th of December, 1836, the following notice was served upon the defendants by the assignees of Coupland and Duncan :

“ We, the undersigned, the assignees, &c. of John Coupland and Frederick Duncan, of Liverpool, merchants and factors, against whom a *fiat* in bankruptcy is now in prosecution, do hereby give you notice that David Scott of Manchester, merchant, Samuel Wood of Manchester, merchant, James Mallalieu of Manchester, manufacturer, and Robert Baird of Liverpool, merchant,—in whose names various shipments of goods were made through the said John Coupland alone, or the said J. Coupland and F. Duncan in partnership, to your correspondents, Messrs. Remington

& Co. of Bombay, and Messrs. Colvin, Ainslie, & Co. of Calcutta, and upon which shipments you came under advances to the respective shippers,—were not the true owners of the shipments made in their respective names, and that such shipments were in fact for the account, and upon the risk of the said J. Coupland, individually, or of the said J. Coupland and F. Duncan, in co-partnership, the said D. Scott, &c. having agreed to lend their names to the said J. Coupland and F. Duncan, to conceal the fact of their being engaged in shipments on their own account. And we do further give you notice, and require of you not to pay or deliver over to the said D. Scott, &c., or any of them, any goods, bills or specie shipped or remitted *to you by the said Messrs. Remington & Co., and Messrs. Colvin, Ainslie & Co., or either of them, as or in part of return for any shipments made by the said nominal shippers through the said J. Coupland alone, or the said J. Coupland and F. Duncan in partnership; but to pay or deliver all such goods, specie, and bills to us as assignees, &c.; we, the said assignees, claiming and insisting upon the returns of all the said shipments as part of the assets of the said bankrupts.”

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The defendants forwarded this notice to the plaintiff with the following letter, of the 28th of December, 1836 :

“SIR,—We annex copy of a notice which we have this day received from the assignees of Messrs. Coupland and Duncan, which we think it right to lay before you for the purpose of urging the necessity of a settlement between you and them, in order that the particular shipments on which they really can substantiate claims may be allowed, and then set at liberty.

“Until this point is attained we shall not be able to act so as to obviate the inconveniences attaching to the stop thus put by the assignees; while, at the same time, we shall be very unwilling parties to any measure that may be prejudicial to any of our correspondents.”

On the 31st of December, 1836, the defendants addressed the following letter to the assignees in reply to their notice :

“GENTLEMEN,—We acknowledge the receipt of a notice under the signature of &c., that various shipments of goods made to our correspondents in India through J. Coupland, and Coupland and Duncan, in the names of D. Scott, Samuel Wood, J. Mallalieu, R. Baird, and Turner, Brade, & Co., to whom we came under advances as the shippers, are not the property of the several persons

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in whose names they were shipped, but of the bankrupts to whose estates you are the assignees. *You further give us notice not to pay over to those parties, any of the returns for any shipments made by the said nominal shippers, but to deliver them to you as the assignees, you claiming and insisting upon all the said shipments as assets of the bankrupts.

“ We have had extensive transactions with the parties you have named through J. Coupland, and Coupland and Duncan, as our agents, and our advances have invariably been made in bank post bills, transmitted direct to the shippers, whose acknowledgments of the same were duly returned to us. We have reason to know, beyond all doubt, that in a great many of these transactions, no reasonable pretence can be set up that they were otherwise than *bonâ fide* dealings of the several parties on their own account. With this knowledge, it is quite repugnant to our sense of justice, and to our inclination, to lend ourselves to the sweeping measure of most serious injury which would be uselessly, for your purpose, inflicted on those who have confided in us, were we to give effect to your notice of not paying to the several shippers any part of the returns for any shipment made in their names through the agency of the bankrupts.

“ We think it belongs to you, in any notice you may choose to serve on us, to particularise the several shipments on which you may consider yourselves entitled to receive the return proceeds: and we beg to observe, that in order to entitle such notice to our consideration, we expect you will accompany it with an undertaking indemnifying us for all consequences to which we may be made liable for withholding, if we should be advised to do so, property as to which we can know no other owner than the person in whose name it was shipped, who received the advance from us, and on whose account we made the necessary insurances.

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“ Assuming that there are pending transactions of *that character which you have assigned to all our dealings with the parties you have named—that persons were found to accept the trust reposed in them by receiving into their names and by acting as the owners of property which in reality belonged to the bankrupts to whom they were to account—we should put it to you whether the parties having so acquired a *primâ facie* ownership, as between them and the bankrupts, by delivery and possession, are not in a situation to maintain their lien on that property in satisfaction of any debts now due to them by the bankrupts. We entertain a strong opinion

that you, as assignees, must submit to such preferable claim; but it is a point on which doubt need not long exist, when the highest legal opinion can be so easily obtained.

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“Referred to as we now are in the character of stakeholders, we feel ourselves at liberty to submit to you the expediency of the earliest possible adjustment of the accounts of the parties you have named to us with the bankrupt’s estate, in order to bring all future questions within the smallest possible compass, by defining at once the extent of debt which these parties may set up to have liquidated from the properties which now stand directed to our hands for their use, to ascertain the sufficiency or otherwise of the expected assets, and thus to see the probable surplus as to which these parties can have no right.

“We deem it our duty to furnish a copy of this letter for the information of the several persons whose interests are intended to be affected by your notice.

(Signed)

“CRAWFORD, COLVIN, & Co.”

Some further correspondence took place between the plaintiff and the defendants, and in a letter from the latter, dated the 31st of October, 1837, the following passage occurs:

“We are quite alive to the probability of unpleasant features occurring in the progress of a law suit, which we should much regret, and to avoid which it may become a question with us whether we may not think it best to relieve ourselves under the act of the interpleader.”

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The plaintiff having ultimately made a formal demand on the defendants, the latter, in July, 1840, through their solicitors, refused to account to the plaintiff for the proceeds of shipments made in his name by Coupland, and Coupland and Duncan, claiming a lien on such proceeds in respect of the debt due to them from the bankrupts.

At the trial, the plaintiff called Coupland, who proved the course of dealing between them. It appeared in his cross-examination that the plaintiff knew that he acted as the agent of the defendants. He stated also, that he had at various times obtained advances to a considerable amount from the plaintiff, upon the faith that the shipments of the goods in question would enable the plaintiff to reimburse himself. On his re-examination, he stated that the plaintiff knew nothing of his arrangements with the defendants, and that the debt due from him to them arose out of entirely

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different transactions. It also appeared from Coupland's evidence, that part of the balance claimed by the plaintiff arose from the sale of goods bought by the plaintiff himself, and part from the sale of goods purchased by Coupland, which were shipped in the name of the plaintiff.

It was contended on the part of the plaintiff, that, as between the plaintiff and the defendants, the goods were undoubtedly the property of the plaintiff, and that the defendants, having received the proceeds on his account, were not justified in withholding the amount.

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For the defendants it was submitted that the goods so shipped in the name of the plaintiff, being in point of fact the property of Coupland, and Coupland and Duncan, *the plaintiff was not entitled in an action for money had and received to recover the proceeds, and that the course of dealing between him and Coupland, whom he knew to be the agent of the defendants, amounted to a fraud upon them, which invalidated his claim, supposing it could otherwise be supported.

The LORD CHIEF JUSTICE left it to the jury to say whether, as between the plaintiff and the defendants, the goods consigned to India, the proceeds of which had come to the hands of the defendants, were the property of the plaintiff; and, secondly, whether the dealings between the plaintiff and Coupland amounted to a fraud which had been productive of injury to the defendants. His Lordship told them that if they were satisfied that, as between the plaintiff and the defendants, the goods were the goods of the plaintiff, and that no fraud had been practised on the defendants, by which they had sustained injury, their verdict should be for the plaintiff (1). The jury having returned a general verdict for the plaintiff, damages 8,204*l.* 3*s.*,

Bompas, Serjt., in Easter Term last, obtained a rule *nisi* for a new trial, on the ground that the verdict was against evidence.

Sir T. Wilde and *Channell*, Serjts. (with whom was *Tomlinson*) now showed cause:

There is no foundation for saying that either the plaintiff or

(1) *Sir Thomas Wilde*, on the part of the plaintiff, excepted to the summing up, on the ground that the question of property and fraud were both irrelevant, contending that the only question that ought to be submitted to the jury

was, whether the defendants had received the proceeds of the sales upon an undertaking to account with the plaintiff. The finding of the jury rendered the exception unnecessary to be considered.

Coupland committed any fraud on the defendants. It will be argued *that Coupland would commit a fraud on them if he consigned his own goods to India in the name of the plaintiff, as he might thereby have obtained larger advances upon them from the defendants than the invoices would warrant. But no such fraud is suggested to have been practised; neither was it shown at the trial that the defendants had sustained any loss or injury from the transactions between the plaintiff and Coupland. It may be admitted that the plaintiff knew that Coupland was the representative of the defendants at Liverpool; but it did not appear that he was acquainted with the terms of the agency. Even supposing it to be true that the plaintiff practised some concealment or deception on the defendants, it is difficult to see how that can be any answer to the action.

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(TINDAL, Ch. J.: The point which the defendants seem to make is, that they have a right to say that the goods are the goods of Coupland.)

It is clear that, after having treated them as the goods of the plaintiff, and received the proceeds to his use, the defendants cannot turn round and say that they belong to Coupland. *Dixon v. Hammond* (1) shows that an agent cannot dispute the title of his principal. *Easum v. Cato* (2) is also in point. Leaving the question of fraud out of the case, it is impossible to say that, as between the plaintiff and the defendants, the goods were not the property of the plaintiff. Admitting, for the sake of argument, that fraud can be set up as an answer under the circumstances of this case, it is denied that any fraud was committed. There appears to have been nothing to prevent Coupland dealing with the plaintiff in the manner in which the consignments were made to India; and there is no ground for supposing that the plaintiff was privy to any fraud. As to the latter, the question of fraud properly resolves itself into two points: *first, whether he practised any deceit on the defendants; and, secondly, if so, whether the defendants sustained any injury. It is clear, as already observed, that the defendants suffered no injury from the dealings between the plaintiff and Coupland. There can be no doubt that if Coupland had not failed in debt to the defendants, they would never have disputed the plaintiff's right to receive this money. Nothing would be more unjust than to allow them to retain it in order that they may set

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(1) 29 R. R. 522 (2 B. & Ald. (2) 24 R. R. 594 (5 B. & Ald. 861; 310). 1 Dowl. & Ry. 530).

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off against it a debt due to them in respect of a totally distinct transaction. On the whole, it is submitted that there is nothing to show that the verdict (which negatived fraud in the plaintiff) is wrong; for the jury were fully warranted in coming to the conclusion at which they arrived.

Bompas, Serjt. (with whom was *Hugh Hill*) in support of the rule :

This is a clear case of fraud on the part of the plaintiff and Coupland, who conspired together to cause the defendants to believe that they had an agent who would properly estimate the amount of the advances to be made on the goods consigned. It is clear that the defendants never would have made any advances without ascertaining the value of the goods, either personally, or by employing some one on whose unbiassed judgment they could rely; whereas Coupland, with the knowledge and consent of the plaintiff, placed himself in a situation which deprived the defendants of his services, and exposed them to imposition. It is just the same as if the cashier of a bank was to get a third party to apply to him to make an advance on a security actually belonging to himself. Here Coupland has advised the defendants that they might safely make advances on goods which turned out to be his own. The question does not turn upon the point, whether ultimately there is any loss. It is a *clear principle of law that where a man undertakes a duty, it is a fraud on his employers for him to place himself in a situation which prevents him from discharging such duty. The action for money had and received is an equitable one, in which the plaintiff must clearly make out that it is against good conscience for the defendant to withhold the money. It is said that the plaintiff's name was always used; but that is the fraud charged,—that he lent his name to conceal the fact that the goods belonged to Coupland; and if that be so, the plaintiff cannot set up the circumstance of the goods passing in his name as entitling him to recover.

[*1042]

(MAULE, J. : Suppose the defendants have, by some fraud of the plaintiff and Coupland, been induced to receive the money to the plaintiff's use. Although so induced, yet, having received it, does not a promise arise to pay it over ?)

It is submitted that they would have a right to hold the money for the true owner.

(MAULE, J. : Here if the defendants had chosen to pay the money to the plaintiff, Coupland could not have objected to their so doing.) SCOTT
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Hardman v. Willcock (1) is very analogous to this case. It was there held that the jury having found that the plaintiff got possession of the goods by means of a fraud, concerted between him and an insolvent, he could not stand in a better situation than the insolvent himself. So, here, the plaintiff having consigned these goods in his name by a fraud between him and Coupland, cannot stand in a better situation than the latter.

(TINDAL, Ch. J. : The plaintiff did not merely lend his name ; he advanced large sums of money on the goods.

MAULE, J. : If Coupland, instead of owing 18,000*l.*, had merely been indebted in 1,000*l.* to the defendants, could the defendants have held the balance for more than the 1,000*l.* ?)

They were clearly entitled to hold it to the *amount of their debt. [*1043]

(MAULE, J. : If that be so, should not the defendants have pleaded that the money was received to the use of the plaintiff, and then have set out the circumstances under which they claimed to retain it ?)

It was not necessary to plead specially. The money never belonged to Scott. It is quite immaterial who was entitled to the balance beyond the amount of the defendants' debt. Suppose there had been no debt due from Coupland to the plaintiff, and there was a debt owing by him to the defendants, could the plaintiff then, by a fraudulent use of his name, prevent a set-off between Coupland and the defendants ?

(MAULE, J. : That would be a case of mutual credit. The defendants would have trusted Coupland, and he would have trusted them.)

It is submitted that the defendants have a right to say that Coupland gave them credit, that the goods are his, and that he handed over the goods to them, and the defendants made him advances thereon. It was never left to the jury whether the plaintiff had a lien on the goods. Supposing the jury to have, in

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effect, found that the plaintiff did not know that Coupland was the defendants' agent, their verdict was clearly against evidence.

(TINDAL, Ch. J. : The jury may have found that, looking at the whole case, no possible injury could have resulted to the defendants from the dealings between the plaintiff and Coupland.)

It is a fallacy to look only at the ultimate result. Looking at the questions left to the jury, their verdict was not warranted by the evidence.

TINDAL, Ch. J. :

[*1044]

I can see no reason for sending this cause down to a second investigation. The action is for money had and received ; and it appeared by various documents produced at the trial, that the defendants uniformly dealt with the plaintiff as the shipper of the goods, that they treated the proceeds thereof as his, and that they stated the balance of each transaction to *be the plaintiff's money. The money in question was therefore clearly had and received to the use of the plaintiff, unless the circumstances show that a fraud was committed by the plaintiff and Coupland, which was productive of injury to the defendants. Two questions were left to the jury. The first was, whether, as between the plaintiff and the defendants, the goods were the property of the plaintiff ; and the jury have found that they were. The second question was, whether any fraud had been practised between the plaintiff and the defendants to the injury of the defendants, and the jury seem, in effect, to have found that there had not. I am not disposed to disturb the verdict, particularly as no new light can be thrown on the case, inasmuch as Coupland was examined at the trial. I am at a loss to see what bearing the alleged misconduct of Coupland and the plaintiff can have upon the case. One effect is said to be, that larger advances may be made on the consignments sent to India. Even if that were so, it is admitted that all those advances were deducted before the balance was struck for which the verdict was given. No injury resulted to the defendants. On the contrary, they reaped an advantage from the transaction by getting a larger commission than they would otherwise have done. Consequently I cannot see how the circumstance—that the plaintiff allowed Coupland's goods to pass in his name, could affect the question between the plaintiff and the defendants. It has been admitted that if the latter had had no demand against Coupland, they could

not have denied that the balance in their hands belonged to the plaintiff. But how can that balance be less money had and received by them to the plaintiff's use, because it turns out that Coupland is largely indebted to the defendants upon another account? It seems to me that justice has been done, and that we ought not to send the case to a second trial.

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COLTMAN, J. :

[1045]

I am of the same opinion. The money in question must be assumed to have been had and received to the use of the plaintiff, unless the dealings between the plaintiff and Coupland amounted to a fraud upon the defendants. I agree that the conduct of these parties is not altogether correct; for I think that persons ought to let the real nature of their transactions be known, and that concealment is unfair and destructive of the confidence which should exist between merchants. The defendants, perhaps, might have had a right to repudiate the contract on discovering its real nature; but they stand in a different situation when the transaction has been completed, and they have the proceeds in their hands. In that position they may possibly be entitled to say, that although they had treated the plaintiff as the owner of the goods, and had held the proceeds on his account, yet, as that was owing to misrepresentation, they would hold such proceeds for the true owner. The question is, whether, as between these parties, the plaintiff is not the true owner. The case might have been different if the defendants had sustained any actual injury; but none has occurred; for they have been repaid their advances, and have received their commission on the consignments. It has been suggested that the debt due to the defendants from Coupland has been the consequence of the plaintiff's dealings with Coupland; but I cannot see any legal connection between such debt and the misrepresentation which was made. As between Coupland and the plaintiff, the latter is clearly entitled to this money; and, as between him and the defendants, it is money received to his use, although it might have been different if any injury had resulted to the defendants from the transaction. The jury, however, have found that no injury was sustained by them.

ERSKINE, J. :

[1046]

In this case the jury have found that the defendants received the money to the plaintiff's use; and the evidence clearly showed that

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the defendants had treated it as money which had come to their hands on his account. But it is said that the verdict cannot be sustained because of a misrepresentation practised on the defendants with the knowledge of the plaintiff, which amounted to a fraud upon them. If it had appeared that the defendants had sustained any injury, it would have been material to consider whether such a fraud had been committed, and whether the jury had come to a right conclusion upon that point. Whether the consignments were made in the name of the plaintiff for the purpose of enabling Coupland to receive larger advances than he would otherwise have obtained, it is impossible to say; but no evidence was given that larger advances than were warranted were made on any goods, except in a few instances, which may be considered accidental. On the part of the plaintiff it has been contended, that the object of the arrangement was not that adverted to, but was, to give the plaintiff a security both for advances made by him in respect of the goods, and for a debt then due to him from Coupland. The latter swore that such was the object of the arrangement, and consequently there was evidence from which the jury might fairly come to that conclusion. There was, therefore, nothing necessarily wrong in the finding of the jury, assuming that fraud alone would have defeated the plaintiff's right of action. But it appears to me that even if the dealings of the parties had amounted to fraud, that would not have been sufficient, unless the defendants could have shown that they had been injured. But, instead of being injured, they appeared to have been benefited by the commission received by them on the larger amount of goods, which was probably purchased in consequence of the arrangement between the plaintiff *and Coupland. It is also said that Coupland owes the defendants 18,000*l.*, and that, if allowed to retain this money as belonging to him, they might set off against it a portion of their debt. I agree, however, with the LORD CHIEF JUSTICE, that this case cannot be altered by the fact that Coupland was indebted to the defendants, if they actually received the money to the use of the plaintiff, and incurred no injury from the arrangement between the plaintiff and Coupland. On the whole, I can see no ground for disturbing the verdict.

[*1047]

MAULE, J. :

I also think that this was money had and received to the use of the plaintiff; and as all the facts were clearly brought out at the trial, that the verdict ought not to be disturbed. The object of

Coupland in entering into the arrangement with the plaintiff was probably to obtain larger advances from the defendants than he could otherwise have done. When, however, the plaintiff, having received advances from the defendants, made further advances to Coupland, he became the purchaser of an interest in the goods. The plaintiff, therefore, having an actual interest in the goods, and being the party actually contracting with the defendants, Coupland could not interfere between the plaintiff and the defendants, and dispute the right of the former to receive the proceeds. The defendants had the benefit of the contract with them, making advances which were for the benefit of the plaintiff, and afterwards reaping the benefit of that part of the contract which was for their advantage, namely, the payment of those advances and their commission out of the proceeds of the consignments. Having done so, they clearly held the balance to the use of the plaintiff, unless the alleged fraud is an answer to his claim. Assuming that there was a fraudulent representation, by which larger advances were made than would otherwise have been *obtained, or whereby advances were made which would not have been made at all, would such a fraud prevent the plaintiff from recovering? Cases have been cited to show that a party, on discovering fraud, may rescind a contract into which he has entered. But he cannot take the benefit of part of a contract, and repudiate the rest. Here, the defendants would not have contested the matter with the plaintiff at all if Coupland had not happened to be indebted to them. The defendants do not seek to put an end to the whole of the transactions with the plaintiff. They have applied part of the proceeds to the payment of their own advances and charges, and they cannot withhold the balance from the plaintiff. When a person has received money as an agent for another under a misrepresentation, he is bound to pay it over, and if he sustains any injury, he may bring an action against the party guilty of such misrepresentation. Here, these defendants, having received the money under a contract with the plaintiff, cannot now say that Coupland was the real party to the transaction. The plaintiff was not a mere agent of Coupland, but entered into a contract with the defendants, in which contract the plaintiff had an interest. I think that the jury came to a right conclusion; that this was money had and received to the plaintiff's use.

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[*1048]

Rule discharged.

1842.
Nov. 17.
[1080]

DODSON *v.* WENTWORTH, ESQUIRE (1).

(4 Man. & G. 1080—1089; S. C. 5 Scott, N. R. 821; 12 L. J. C. P. 59;
6 Jur. 1086.)

Bales of flax sold by A. in London to B. residing at Mickley Mill, are addressed to "B., Mickley" and are shipped for Hull under a bill of lading making them deliverable "at the port of Boroughbridge for B., Mickley Mill." The bales are forwarded from Hull to Boroughbridge by water-carriage, and are deposited there in the warehouse of C. a party unconnected with the carriers, who was in the habit of receiving goods for B. and holding them at B.'s risk, and without charging warehouse-rent, until fetched away by B. or delivered to other persons by B.'s order.

The *transitus* is at an end, and the bales cannot be stopped by A. upon the insolvency of B. although B. has exercised no act of ownership over them.

TROVER for 100 bales of flax. Pleas; not guilty, and not possessed.

[*1081]

At the trial before Lord Denman, Ch. J., at the last Assizes for Yorkshire, it appeared that the action was brought against the sheriff of that county under the following circumstances: The plaintiff was a flax merchant in London, who for many years past had had dealings with one Thomas Weatherald, a flax-spinner, residing at Mickley Mill, about thirteen miles from Boroughbridge, in Yorkshire. The goods which Weatherald had from time to time purchased of the plaintiff, were usually sent by sea to York or Hull, and thence *by canal to Boroughbridge, or sometimes to Ripon; from which places they were conveyed to Mickley Mill, sometimes by carrier, sometimes in Weatherald's own carts. On the 16th of August, 1841, Weatherald ordered of the plaintiff 100 bales of jute (a species of flax from the East Indies) "to be sent to Boroughbridge, as usual." On the 21st of August the flax, directed "to T. Weatherald, Mickley Mill, near Ripon," was shipped by the plaintiff on board a vessel, called the *Laurel*, then lying in the Thames. In the bill of lading the *Laurel* was described as "bound for Boroughbridge," and the jute was "to be delivered at the afore-said port of Boroughbridge unto Mr. Thomas Weatherald, Mickley Mill, near Ripon, or to his assigns, he or they paying freight for the said goods, 15s. per ton, delivered free in Boroughbridge." The *Laurel* arrived at York in due course, and the flax was transhipped into a boat belonging to the Ripon Fly-boat Company, which Company conveyed goods by canal from York to Ripon. On the 4th of September the flax was landed from the fly-boat at Boroughbridge, and was lodged there in a warehouse belonging to the Ouse Navigation Company, which had no connection with the

(1) Sale of Goods Act, 1893, s. 45, and Mr. Chalmers's note.

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Fly-boat Company. On the 6th of September, Weatherald stopped payment; but his insolvency was not known to the plaintiff until the 8th. On that day the plaintiff wrote to the canal agent at Ripon, desiring him not to deliver the flax to Weatherald. On the 10th, the flax was seized by the defendant, under an execution against Weatherald, who had never claimed the flax, or exercised any act of ownership over it.

The agent of the Fly-boat Company stated that goods addressed to Weatherald were always put by him into the warehouse belonging to the Ouse Navigation Company, unless Weatherald's carts were ready, at the time of landing, to receive them. And the warehouseman of the *Ouse Navigation Company added that goods so received were considered to be at the risk of Weatherald, as no wharfage or warehouse charges were ever made in respect of them; and that when he sent for them, or directed them to be delivered to third parties, they were delivered accordingly, without any further communication with the Fly-boat Company.

[*1082]

On the part of the plaintiff, who insisted that the *transitus* was not at an end, and that his right of stoppage had therefore been properly exercised, *James v. Griffin* (1) and *Jackson v. Nichol* (2) were cited; and on the part of the defendant, *Wentworth v. Outhwaite* (3) and *Allan v. Gripper* (4).

His Lordship thought that the *transitus* was at an end, and directed a verdict for the defendant; reserving leave to the plaintiff to move to set it aside and enter a verdict for himself for 249*l.*, the amount agreed upon.

Channell, Serjt. on a former day in this Term (2nd of November), having obtained a rule *nisi* accordingly,

Bompas, Serjt. now showed cause:

The goods had reached their destination, as far as the plaintiff was concerned, when they were landed at Boroughbridge. The Ouse Navigation Company had authority to receive them for Weatherald, the consignee; and the goods would remain in their warehouse until they were again set in motion by him. The right of stoppage *in transitu* was therefore at an end. The cases relied

(1) 46 B. R. 243 (1 M. & W. 20);
S. C., after a new trial, 2 M. & W.
623.

(2) 50 B. R. 777 (5 Bing. N. C. 508;
7 Scott, 577).

(3) 10 M. & W. 436 (not reported
at the time of the argument of the
principal case).

(4) 37 B. R. 682 (2 Cr. & J. 218;
2 Tyr. 217).

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upon by the plaintiff are distinguishable. In *James v. Griffin*, though the goods were landed at a wharf by the directions of the *consignee, yet it was clearly proved that he did not intend to take possession of them as owner. In *Jackson v. Nichol*, the goods were stopped before there had been any delivery to the consignee, either actual or constructive. *Dixon v. Baldwin* (1) is a strong authority for the defendant. In that case Lord ELLENBOROUGH said the transit was at an end "when the goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and where, without such orders, they would remain stationary." That principle is strictly applicable to the present case.

(TINDAL, Ch. J. : In that case the delivery was to the appointed agent of the consignee. *Rowe v. Pickford* (2) is much nearer to the present case.)

The facts there are almost identical with those in this case. [He also cited *Foster v. Frampton* (3), *Wentworth v. Outhwaite*, *Dixon v. Yates* (4), *Jackson v. Nichol*, *Richardson v. Goss* (5), *Coates v. Railton* (6), *Stokes v. La Riviere* (7), *Ellis v. Hunt* (8), and *Bohtlingk v. Inglis* (9).]

[1084]

Talfourd, Serjt. (with whom was *Hoggins*) in support of the rule :

The fact of the vendee having taken possession of part of the goods in *Wentworth v. Outhwaite* forms a material distinction between that case and the present, and, though not adverted to by the Court, cannot be supposed to have escaped their observation. It is a circumstance of weight, as tending to show the position of the goods. The acts of the vendee are always of the greatest importance to the decision of the question whether or not the transit is at an end. In this case the goods, when warehoused at Boroughbridge, were in an ambiguous situation ; the character of which would be determined by a very slight act on the part of the vendee. They are addressed to him at Mickley Mill, thirteen miles from Boroughbridge.

(1) 7 R. R. 681 (5 East, 175).

(2) 19 R. R. 466 (8 Taunt. 83; 1 Moore, 526).

(3) 30 R. R. 255 (6 B. & C. 107; 9 Dowl. & Ry. 108).

(4) 39 B. R. 489 (5 B. & Ad. 313; 2 Nev. & M. 177).

(5) 6 R. R. 727 (3 Bos. & P. 119).

(6) 30 R. R. 385 (6 B. & C. 422; 9 Dowl. & Ry. 593).

(7) 7 R. R. 499 (cited, 3 T. R. 466).

(8) 1 R. R. 743 (3 T. R. 464).

(9) 7 R. R. 490 (3 East, 381, 396).

(MAULE, J. : By the bill of lading they are to be delivered "at the port of Boroughbridge unto Mr. Thomas Weatherald, Mickley Mill." That must mean of Mickley Mill. It is mere description.)

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When the goods arrive at Boroughbridge, the vendee gives no direction respecting them ; he is not liable for warehouse rent or wharfage dues ; and he does not exercise any act of dominion over them. Under these circumstances the goods cannot be said to have come even to his constructive possession. The Ouse Navigation Company cannot be considered as his agents, so as to bring the case within the principle of *Dixon v. Baldwin* (1). * * There was nothing here to show any command or control by Weatherald over the goods ; the warehouse, in which they were housed, was not his, either actually or constructively, as he was not to pay any rent.

[1085]

(ERSKINE, J. : It does not appear that the mere fact of rent being paid would have made any difference : *Hammond v. Anderson* (2).)

James v. Griffin shows that *a mere delivery of goods to a wharfinger, though by the directions of the consignee, if the latter does not intend to take possession of them, will not take away the right of stoppage *in transitu*.

[*1086]

(MAULE, J. : The question is upon whose account the warehousemen held the goods in this case,—it is clear they did not hold them for the Fly-boat Company, as that company were not consulted about the delivery.)

The warehousemen are not to be considered as the agents of Weatherald to receive goods on all occasions, because in some former cases goods had been left for him at their warehouse.

TINDAL, Ch. J. :

It appears to me that this case falls within the principle laid down in *Dixon v. Baldwin*, and that the *transitus* was at an end when the goods were lodged, under the circumstances stated in evidence, in the warehouse of the Ouse Navigation Company at Boroughbridge. The goods, which were shipped in London, on board the *Laurel*, were, by the terms of the bill of lading, to be delivered at Boroughbridge to Thomas Weatherald, Mickley Mill,

(1) 7 R. R. 681 (5 East, 175).

(2) 8 R. R. 763 (1 Bos. & P. (N. R.) 69).

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near Ripon. The goods were brought in the *Laurel* to York, and there, in the usual course, transhipped and put on board of boats belonging to the Fly-boat Company, who carry goods from York to Ripon. In passing Boroughbridge, the goods were landed there, and placed in a warehouse belonging to the Ouse Navigation Company, who are totally distinct from the Fly-boat Company. Now it is not immaterial to observe that the warehouse in which the goods were lodged was not the warehouse of the carrier; as some of the cases turn upon the point that the *transitus* is not at an end while the goods remain in the possession of the carrier, not only in the actual course of the journey or voyage, but even while they are in a place of deposit connected with their transmission. But the place of deposit here, is the warehouse of a third *party—the Ouse Navigation Company; and then the question comes to this, whether that Company are to be considered as the agents of the carriers or of the consignee. Now what is the evidence upon that point? It appears that the Fly-boat Company had been in the habit, for some time past, of receiving and carrying goods addressed to Weatherald, and of landing them at Boroughbridge, where they were put into the warehouse in question, unless Weatherald's carts were there ready to receive them. So that it seems that, *quoad* the *transitus*, the goods were as much delivered to Weatherald, when placed in that warehouse as if they had been at once loaded in his waggons. It further appears that the Ouse Navigation Company did not hold the goods on account, or subject to the control, of the Fly-boat Company, inasmuch as the Ouse Navigation Company delivered them over without any communication from the Boat Company, and according to directions received from Weatherald. The state of facts very closely resembles that in *Dixon v. Baldwin*, where it was laid down that the delivery of goods to the appointed agents of the vendee, from whom the agents were to receive orders as to the ultimate destination of the goods, put an end to the right of stoppage *in transitu*. I cannot distinguish that case from the present. In this case it is true no wharfage or warehouse charges were paid by Weatherald to the Ouse Navigation Company; but, though the fact of such a payment is often a material circumstance, it is by no means conclusive. It might be an object with the Ouse Navigation Company to provide such accommodation for parties without charge, as an inducement to them to send goods by the canal, the Company considering themselves sufficiently remunerated by the tolls. *Allan v. Gripper* is also very analogous to the present case. There

goods were conveyed by a carrier by water, and deposited in his warehouse, for the convenience of the *vendee, to be delivered out as he should want them; and the *transitus* was held to be at an end, although it appeared that the carrier claimed to have a lien on the goods. That is much stronger than the present case. For these reasons I think the verdict for the defendant ought to stand.

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COLTMAN, J. :

I am of the same opinion. By the bill of lading the goods are to be delivered at Boroughbridge; and the words "Mickley Mill, Ripon," after the name of the consignee, do not point out the place of destination where the *transitus* is to end: they are merely a designation of the party to whom the goods are consigned. Boroughbridge is clearly the place at which the carriage of the goods is to terminate, and at which their delivery is to take place. This appears from the bill of lading; and the evidence in the case is consistent with this; as it appears that when the goods arrived at Boroughbridge, they were landed and placed in a warehouse where goods had been in the course of being left for Weatherald. *James v. Griffin* was relied upon by the plaintiff, to show that it was competent to Weatherald to refuse to receive them. Possibly that may be; but there is, at any rate, no evidence of any such refusal on his part. In point of honour, he may have been called upon to decline receiving them, knowing the state of his own affairs; but, in point of fact, he did not do so. No question, therefore, can arise as to the effect of any refusal. It seems to me to be the same thing as if the goods had been delivered at the consignee's own premises, without his knowledge, after his insolvency.

ERSKINE, J. :

The question really is, whether, under the circumstances of this case, the warehouse of the Ouse Navigation Company was to be considered as the warehouse of Weatherald or not. It does not appear *that either the plaintiff or the carriers, the Fly-boat Company, had any thing to do with the warehouse; but it does appear that Weatherald had been previously in the habit of using that warehouse as a place of deposit for goods which were consigned to him. Therefore, according to all the cases, and especially according to *Allan v. Gripper*, which is a much stronger case than the present, the *transitus* was at an end, and the consignor had lost his right of stoppage.

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MAULE, J. :

I am of the same opinion. The goods were shipped by the vendor, and, by the terms of the bill of lading, they were to be delivered to the vendee at Boroughbridge. The duty of the carriers was at an end when they had brought the goods to Boroughbridge, and had delivered them there to the vendee or to some person on his behalf. It appears from the evidence that the vendee had, in effect, appointed the Ouse Navigation Company his agents to receive goods on his behalf. The carriers, therefore, completed their duty by delivering the goods to the Ouse Navigation Company, who were to receive and hold them—not on behalf of the carriers, for the purpose of forwarding them to the vendee,—but on the behalf of the vendee and subject to his order. I think it quite clear that, under all the circumstances, upon the delivery at the warehouse of the Ouse Navigation Company, the right of the consignor to stop these goods was at an end.

Rule discharged.

1842.
Nov. 18.
[1090]

EDSALL v. RUSSELL.

(4 Man. & G. 1090—1104; S. C. 5 Scott, N. B. 801; 12 L. J. C. P. 4; 2 Dowl. N. S. 641; 6 Jur. 996.)

A count in slander, after an inducement that the plaintiff was an apothecary and had attended the defendant's child, stated the words to be, "He killed my child; it was the saline injection that did it;" innuendo, that the plaintiff had been guilty of feloniously killing the child by improperly and with gross ignorance and with gross and culpable want of caution, administering the injection. Plea, that the plaintiff had professed to be an apothecary, and the defendant, upon the faith of his being qualified as such, suffered him to attend the child; and that the plaintiff did injudiciously, indiscreetly and improperly, and contrary to his duty in that behalf, administer a saline injection to the child, who thereupon shortly afterwards died; and that the death was caused or accelerated by the injection :

Held, that the words, as laid, contained a charge of manslaughter, and that the plea, which must be taken to have confessed the words in the sense imputed to them in the count, contained no justification of the words, so understood.

A second count was upon the following words: "He made up the medicines wrong through jealousy, because I would not allow him to use his own judgment;" innuendo, that the plaintiff had intentionally, and from jealousy and improper motives, made up the medicines which he had administered to the child in a wrong and improper manner; and that such medicines were, to the plaintiff's knowledge, unfit and improper to be administered to the child :

Held, that the count was bad, as the words—which were not charged to have been spoken of the plaintiff in his profession,—did not impute any indictable offence.

A third count was upon the following words: "Mr. P. told me that he

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(the plaintiff) had given my child too much mercury, and poisoned it; otherwise it would have got well." The plea justified so much only of the words as imputed the giving too much mercury:

Held, bad, inasmuch as the words attempted to be justified were not slanderous.

CASE for slander. The first count of the declaration, after the usual inducement as to the plaintiff's good name &c., stated that, before the committing &c., the plaintiff had, at the request of the defendant, attended a certain child of the defendant, which child was then ill, sick and disordered, with the view of curing and healing such illness, sickness and disorder; and that the plaintiff, with the view and intention aforesaid, and with the consent and permission of the defendant, made up and administered to the said child, in a proper and careful manner, and to the best of the plaintiff's knowledge *in that behalf, certain medicines, and amongst others, a certain saline injection; that afterwards, and before the committing of the grievances thereafter mentioned, the said child died of the sickness, illness and disorder aforesaid; that, before and at the time of the happening of the special damage to the plaintiff as thereafter mentioned, the plaintiff was an apothecary, and the business of an apothecary then carried on with skill and attention. Yet the defendant, contriving &c., theretofore, to wit, on &c., in a certain discourse &c. falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the said administering by the plaintiff of the said saline injection to the said child of the defendant, the false, scandalous, malicious and defamatory words following, that is to say, "he (meaning the plaintiff) killed my (meaning the defendant's) child; it was the saline injection that did it" (thereby meaning the said saline injection; and that the plaintiff had been and was guilty of feloniously killing the said child by improperly and with gross ignorance, and with gross and culpable want of caution, and without due regard to the safety of the said child, administering to it the said saline injection).

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Second count—that the defendant, further intending &c., afterwards, to wit, on &c., spoke and published the false &c., words following of and concerning the plaintiff, and of and concerning the said making up and administering by the plaintiff of the said medicines to the said child of the defendant, that is to say, "he (meaning the plaintiff) made up the medicines (meaning the said medicines so made up and administered by the plaintiff to the said child as aforesaid) wrong, through jealousy, because I (meaning

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the defendant) would not allow him (meaning the plaintiff) to use his own judgment," (thereby meaning that the plaintiff had intentionally, and from jealousy and improper motives, made up the medicines *which he had administered to the said child, in a wrong and improper manner, and that such medicines were thereby, to the knowledge of the plaintiff, unfit and improper to be administered to the said child). By means of the committing of which said grievances thereinbefore respectively mentioned, one, Joseph Brookbank, afterwards, and after the plaintiff had become and was an apothecary, and whilst the plaintiff used and carried on the profession and business of an apothecary as aforesaid, and before the commencement of the suit, to wit, on, &c., refused to employ the said plaintiff in his said profession and business of an apothecary, as he otherwise would have done; whereby the plaintiff had necessarily lost and been deprived of divers great gains, &c.

Third count—that the plaintiff, before and at the time &c. was an apothecary, and the profession and business of an apothecary used and carried on with skill and integrity. Yet the defendant, further contriving as aforesaid, to wit, on &c. in a certain other discourse &c., falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him as such apothecary as aforesaid, the false, &c. words following, that is to say, "Mr. Pilcher told me (meaning the defendant) that he (meaning the plaintiff) had given my child (meaning the said child of the defendant) too much mercury, and poisoned it (meaning the said child) otherwise it (meaning the said child) would have got well," (meaning thereby that the plaintiff had, either from ignorance or inattention and want of caution, administered to the said child of the defendant thereinbefore mentioned, such an excessive quantity of mercury that the said mercury acted as a poison, and caused the death of the said child). By means &c., concluding with an averment of general damage.

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Pleas; fifthly, as to the speaking and publishing the following words in the first count mentioned, that is to *say, "he killed my child, it was the saline injection that did it," *actio. non*; because before the speaking and publishing of the several words in the introductory part of that plea referred to, to wit, on, &c., he, the plaintiff, professed himself to be an apothecary, duly entitled and qualified to act as such, and the defendant, on the faith of his, the plaintiff's, being so duly entitled and qualified, and knowing nothing to the contrary, did suffer and permit the plaintiff to attend the

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said child of the defendant, who was then sick and disordered, for the purpose of administering to the said child such medicines as might, under the circumstances, be proper, and the plaintiff did then injudiciously, indiscreetly and improperly, and contrary to his duty in that behalf, administer a certain saline injection to the child of the defendant; and the said child thereupon, and immediately after the aforesaid injection had been administered as aforesaid, was thrown into violent convulsions, and then lost and was deprived of his speech, sight and hearing, and effusion upon the brain and locked jaw then also supervened, so that the aforesaid child shortly after died; and that the death of the said child was then caused and occasioned, or greatly accelerated, by the aforesaid saline injection so administered to him by the plaintiff as aforesaid; wherefore the defendant did afterwards, to wit, on the day and year in the first count mentioned, speak and publish the said words of and concerning the plaintiff in the introductory part of that plea referred to, as he lawfully might for the cause aforesaid. Verification.

Sixth, as to the speaking and publishing so much of the words in the second count mentioned as imputes to the plaintiff the having administered to the child of the defendant improper medicines, *actio. non*; because before the speaking and publishing &c., he, the plaintiff, professed himself to be an apothecary &c. (as *in the fifth plea); and the plaintiff did then improperly, and contrary to his duty in that behalf, administer to the aforesaid child of the defendant, divers large quantities of medicine, the same being then of an injurious nature and unfit for the complaint under which the said child then suffered, as in the said second count mentioned; wherefore the defendant did afterwards, to wit, on &c. speak and publish &c. Verification.

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Seventhly, as to the speaking and publishing of so much of the words in the last count mentioned, as imputes to the defendant the having given to the aforesaid child too much mercury, *actio. non*; because before the speaking and publishing &c. the plaintiff professed &c. (as in the fifth plea); and the plaintiff did then wrongfully &c. administer to the said child of the defendant divers large quantities of mercury, to wit, fifty grains, the same being an excessive quantity thereof, having reference to the then state, condition and disorder of the said child; wherefore the defendant did afterwards, to wit, on &c. speak and publish, &c. Verification.

Demurrer to the fifth plea, assigning for causes—that the said fifth plea was no answer to the first count, or to the speaking and

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publishing of the words therein mentioned, in the sense and meaning therein and thereby imputed; but that the said fifth plea assumed to answer the words to which it was pleaded in a different sense from that in which in the first count they were alleged to have been spoken; that the defendant could not, by the rules of pleading, sever and disjoin the sense and meaning imputed in and by the innuendo therein contained from the words themselves, to which that innuendo was annexed; that the first count charged the defendant with having imputed to the plaintiff the crime of manslaughter by administering certain medicines with gross ignorance and gross want of caution; whereas the *said fifth plea did not justify such charge, but set up as answer only the alleged circumstance of the said medicines having accelerated the death of the child therein mentioned, &c.

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Demurrer to the sixth plea, assigning for causes, that it was not pleaded to, nor did it assume to justify, the words mentioned in the second count in the sense and meaning in which they were therein alleged to have been spoken; that the charge in the said second count mentioned was not divisible, and the defendant could not, by the rules of pleading, assume to answer a part thereof only; that the said sixth plea did not in any way justify the speaking of the words in the said second count mentioned, or the complaint of the plaintiff therein contained; and that such complaint could not be split and severed in the mode attempted in and by the said sixth plea, &c.

There was a similar demurrer to the seventh plea, assigning also for causes, that the complaint of the plaintiff in the said last count, was, not that the defendant spoke and published that the plaintiff had given to the child of the defendant too much mercury, but that the defendant falsely spoke and published that the plaintiff gave to the said child of the defendant so much mercury that the said child was poisoned; that the said last plea did not confess that the words mentioned in the introductory part of it were spoken of and concerning the plaintiff as such apothecary as therein mentioned &c.

Joinder in demurrer.

Channell, Serjt. for the plaintiff:

It is perhaps intended to be urged as an objection to the first count, that it is not stated therein that the plaintiff was an apothecary at the time he administered the saline injection to the defendant's child; but such an averment was not necessary, as the words impute a distinct charge *of manslaughter.

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(*Talfourd*, Serjt., for the defendant, intimated that he should not raise any objection to the first count.)

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Then the fifth plea contains no answer to that count. It justifies using the words in a sense different from that attributed to them by the innuendo. If the words were not used in the sense imputed by the plaintiff, the defence would be open to the defendant under the general issue: *Mountney v. Watton* (1).

The sixth plea to the second count attempts to justify only a portion of the words which does not charge the plaintiff with any crime punishable by law. It may be argued indeed that the whole of the words in the second count do not charge any such crime; that the words therefore are not actionable *per se*, and that there is no special damage of which the Court can take notice. But it is submitted that it does charge an offence of which the law will take cognizance; for it states in substance that the plaintiff knowingly and wilfully made up and administered to the child wrong medicines. It is true it is not stated in that count that the child died in consequence.

(TINDAL, Ch. J. : It is not even said that the child got worse.

MAULE, J. : For anything that appears, it may have got better. The administering a wrong medicine even with a wrong intention, may have done no harm; for the child's condition may have altered, and the medicine may have done good. There is no distinct charge, indeed, of any administering in the second count; it speaks only of a making up of the medicine.)

It is submitted that, taking the innuendo and the introductory averments together, the second count does charge the plaintiff both with the making up a wrong medicine and administering it.

(COLTMAN, J. : Would that be a crime punishable at law? How could the party be indicted for it?)

Perhaps technically it might be treated as an *assault, though the patient consented: *Rex v. Rosinski* (2). If death had ensued from a wilful, or even a negligent, administering of a wrong medicine, the plaintiff would have been indictable for manslaughter; an attempt, therefore, to commit that offence would be a misdemeanor: or even an attempt to commit a misdemeanor is a misdemeanor:

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Rex v. Meredith (1). The wilful administering of a wrong medicine is therefore indictable, though death may not be the consequence. The direct consequences of an act cannot be the proper criterion of its criminality.

(MAULE, J.: There is no averment of any intention to do mischief. A warehouseman, who carelessly lets fall a bale of goods into the street, whereby a passer-by is killed, might be indicted for manslaughter; but would he be indictable at all, if no one was passing by, and no harm was done by the bale?)

Probably not; but here, an intentional breach of duty is charged. A wrong administering is alleged, in a case where the law requires competent skill; and that amounts to the allegation of a wrong.

The seventh plea does not profess to answer the gist of the charge in the third count, which is a charge of poisoning; and it is bad, as giving the words a different sense from that laid in the innuendo.

Talfourd, Serjt., for the defendant:

The words in the first count are sufficiently justified in the fifth plea. They amount to no more than charging the plaintiff with causing the child's death by administering the saline injection.

(TINDAL, Ch. J.: The words are "he killed my child." The word "killed" of itself might be of doubtful import, but as explained by the innuendo, it means a felonious killing. And this is admitted by the fifth plea.)

[*1098] A justification may be good without reference *to the sense ascribed to the words by the innuendo: *Cromwell's* case(2), where it is said, "sensus verborum ex causâ dicendi accipiendus est, et sermones semper accipiendi sunt secundum subjectam materiam;" and again, "although he (the defendant) varies from the plaintiff in the name and quality of the words, yet it is no cause to drive him to the general issue; as in maintenance, the plaintiff charges the defendant with unlawful maintenance, the defendant may justify by reason of a lawful maintenance."

(TINDAL, Ch. J.: *Cromwell's* case was an action for *scandalum magnatum*, in which it was not necessary to allege the exact words.)

(1) 8 Car. & P. 589.

(2) 4 Co. Rep. 12 b.

If the words do impute a felony, they are justified by the plea. For it would be manslaughter to administer a medicine so indiscreetly that death was occasioned thereby : *Rex v. St. John Long* (1).

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The second count is clearly bad, as the words there alleged do not charge any offence punishable by law. No indictment could be maintained on such a charge. If that count is considered good, it is submitted that the sixth and seventh pleas are also good, as it is not necessary to justify the whole of the slanderous matter : *Clarkson v. Lawson* (2).

(MAULE, J. : No cause of complaint is admitted by those pleas, unless they are considered as admitting that it is a cause of action to charge the knowingly administering of improper medicines.)

Channell, Serjt. was heard in reply.

TINDAL, Ch. J. :

The objection raised to the first count in the declaration has not been insisted on. The words alleged to have been spoken, as explained by the innuendo, clearly amount to a charge that the plaintiff had been guilty of manslaughter, in causing the death of the *defendant's child by administering an injection with gross ignorance, and with culpable want of caution. Then the question is, whether the answer set up by the fifth plea is sufficient, whether it confesses and avoids the use of the words in the sense suggested by the plaintiff. I think the defendant must be taken to admit that he used the words in the sense imputed by the plaintiff, that is, as conveying a charge of manslaughter. Now to justify such a charge, it is not sufficient to show mere want of care and caution ; there must be gross negligence and want of that degree of skill which every one, who undertakes the exercise of any particular art or profession, is bound to bring to each particular case. But all that the plea here charges is, that the plaintiff "injudiciously, indiscreetly, and improperly, and contrary to his duty," administered the saline injection ; and "that the death of the child was caused and occasioned, or greatly accelerated, by the aforesaid saline injection." Now this is no more than a simple statement of, at most, want of judgment on the part of the plaintiff ; and does not amount to the crime with which the defendant has charged him. The plea is therefore bad as confessing the

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(1) 4 Car. & P. 398, 423.

(2) 31 R. R. 418 (6 Bing. 266, 587 ;
3 Moo. & P. 605 ; 4 Moo. & P. 356).

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use of the words in the sense imputed to them, by the plaintiff, and not avoiding or justifying them in the same sense, by showing the truth of the charge.

I have had considerable doubt whether the words alleged in the second count amount to the charge of a crime, or a legal offence. Perhaps, by construing them very closely, they might be considered as approximating to a criminal charge—but that is not sufficient; for where a party makes a charge of slander, it is for him to show that the words bear a slanderous sense. Upon the whole I do not think that the words in the second count convey any charge of an indictable offence. The words are, “he made up the medicines wrong through jealousy, *because I would not allow him to use his own judgment.” There is no innuendo that the defendant meant to impute that the medicines occasioned any injury to the child; so that whether they were noxious or perfectly innocent is left entirely in doubt. An indictment for *mala praxis* could not be supported without showing that there had been gross and culpable negligence, or that the party knew that great mischief would be likely to result from what he did, or from the medicines he was about to exhibit. I think, therefore, that the defendant is entitled to judgment on the second count.

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As to the third count, the charge contained in it is either negligence or want of proper knowledge of medicine. No objection is made to this count. In the plea to it (the seventh), the defendant does not sever one distinct portion of the slander from another, and profess to answer such portion, as in *Clarkson v. Lawson*; but he abstracts certain words found in the third count, and only professes to answer the charge conveyed by those words, namely, the administering of an excessive quantity of mercury, but not such an excessive quantity as poisoned the child. The plea is bad, therefore, as neither confessing nor avoiding the alleged slander.

Upon the whole, therefore, the plaintiff is entitled to judgment on the demurrers to the fifth and seventh pleas, and the defendant, on the demurrer to the sixth plea, by reason of the insufficiency of the second count.

COLTMAN, J. :

I am of the same opinion. *Cromwell's* case, upon which it is sought to support the fifth plea, is very different from the present. In that case the Court could see that the words were not used in

the sense charged ; but here the defendant must be taken to admit that he imputed felony to the plaintiff ; and all that he alleges in his plea to justify that charge is, that *the plaintiff treated the child injudiciously. As to the second count, I cannot see that any thing was imputed which could legally subject the plaintiff to a criminal charge, and the Court cannot add to the meaning of the words.

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ERSKINE, J. :

I also am of opinion that the fifth plea is no answer to the first count, which is admitted to be good, as containing a charge of manslaughter. The plea must be taken to confess the speaking of the words in the sense attributed to them by the plaintiff ; and it justifies the use of them, because the plaintiff had injudiciously, indiscreetly, and improperly, and contrary to his duty, administered a certain medicine to the defendant's child, by means whereof it died. The words impute felony ; but the plea shows nothing to justify such a charge. In *Cromwell's* case it was shown that the words were not spoken in the sense imputed by the declaration. There is nothing in the plea to rebut the interpretation which the plaintiff had given to the words by his innuendo. I think, therefore, the plea is bad.

The second count does not show that the defendant meant to impute any intention to injure the child by administering the medicines, or that any injury resulted from administering them. To make this a good count, some fact should have been stated showing that the plaintiff was liable to an indictment.

There is no objection to the third count, and I agree that the plea to it is bad, as affecting to justify only so much of the words charged in that count as does not amount to a cause of action.

MAULE, J. :

I am of the same opinion. As to the first and third counts, it is not necessary to add any thing to what has already fallen from the Court.

I also think the second count bad. It only states that *the defendant charged the plaintiff with making up the medicines wrong, through jealousy ; and the innuendo is, that the defendant thereby meant that the plaintiff had intentionally, and from jealousy and improper motives, made up the medicines which he

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had administered to the child in a wrong and improper manner. And I am disposed to think that the charge of making up the medicines, coupled with the innuendo, may in effect amount to a charge of administering the medicines. But that is all. It is not said that the plaintiff did, or intended to do, any harm to the child; and if no harm was either done or intended, I do not see how it would be an offence to make up and administer medicines in a wrong and improper manner. A wrongful act, without any intention to injure, and where no injury results from it, is no offence. It has been argued that the administering of medicines improperly might be considered as an assault; but I cannot agree to that as a general position; as the administering does not necessarily imply any personal contact.

With regard to the fifth plea, how does it profess to answer the words alleged to have been spoken in the first count, amounting to a charge of felonious killing? It does not even profess to answer them in the sense in which they are used; and upon that ground it is clearly bad. Indeed, as it is pleaded, it does not set out any thing contained in the first count, which amounts to a cause of action; and it would, in my opinion, be bad upon that ground. The rule in *Cromwell's* case, it may be observed, is not very consonant to the rule of pleading in modern times. The plea there seems to be of that species which is considered to give implied colour. But the plea in this case is of a very different character. It professes to justify a charge of manslaughter by administering improper medicine. It alleges merely a want of judgment and discretion on the part of the *plaintiff. But an injudicious and indiscreet administering of medicine will not make a man guilty of manslaughter. There must at least be gross negligence on his part; and the plea does not allege that. It is, therefore, I think, clearly bad.

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The seventh plea is also, I think, bad. It merely selects a part of what is charged by the words set out in the third count, namely, the giving of too much mercury, and is pleaded to that. There might be nothing in that amounting to an offence; and it appears to me that a defendant in an action for defamation cannot pick out of a slanderous sentence certain words, which have no slanderous effect, and justify them alone. It is not stated in the plea that any wrong was done in reference to the then state of the child.

I agree with the rest of the Court, therefore, that judgment

should be given for the plaintiff upon the demurrers to the fifth and seventh pleas, and for the defendant upon the demurrer to the sixth plea.

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Judgment accordingly (1).

NEWTON AND WIFE v. HARLAND AND ANOTHER.

(4 Scott, N. R. 769—773.)

1842.
April 26.

[769]

Upon a change of attorneys under a rule of Court, the new attorney undertook to hold the record and papers in the cause subject to the lien of the former attorney: Held, that, the cause having been brought to a successful termination, the former attorney was entitled to call upon his successor to proceed with the taxation, issue execution, and pay him the amount of his lien out of the first proceeds, subject only to the costs necessarily incurred on such taxation.

THIS was an action of trespass and assault. The defendants pleaded: first, not guilty; secondly, a justification, to which the plaintiffs replied *de injuriâ*.

The cause was first tried before Parke, B., at the Yorkshire Summer Assizes, 1837, when a verdict on the second plea was, under the direction of the learned Baron, found for the defendants. In the following Michaelmas Term, a rule *nisi* was obtained for a new trial, on the ground of misdirection. This rule was made absolute in Easter Term, 1838 (2).

In Trinity Term, 1838, upon an application on the part of the plaintiffs to change their attorney, the following rule was pronounced, by consent: "That the record of *Nisi Prius*, and all other papers in this cause in the possession or power of Mr. Basham (the plaintiffs' former attorney) *be delivered up by the said Mr. Basham to Mr. A'Beckett, or some other attorney to be retained by the plaintiffs as their attorney in this cause in the stead of the said Mr. Basham, and with his consent: and that such attorney so to be appointed as aforesaid do hold such record and papers in his hands, subject to any lien which the said Mr. Basham may now have on the same for costs due to him from the plaintiffs." Pursuant to this rule, the papers in the cause were delivered up to Mr. A'Beckett, who thenceforth conducted the cause as attorney for the plaintiffs.

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The cause was again tried at the Yorkshire Summer Assizes,

(1) The judgment for the defendant though founded upon pleadings terminating in a demurrer and joinder, would be expressed to be, in respect of the sufficiency of the count and not

in respect of the sufficiency of the plea as asserted by the defendant in his joinder in demurrer.

(2) *Vide* 56 R. R. 488 (1 Scott, N. R. p. 474; 1 Man. & G. 644).

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1838, before Alderson, B.; on which occasion also a verdict was, under the direction of the Judge, found for the plaintiffs on the first plea and for the defendants on the second. In the following Michaelmas Term a rule *nisi* was obtained for a new trial, on the ground of misdirection; which rule, after two arguments, and time taken to consider, was made absolute (1).

A third trial took place, before Coltman, J., at the Yorkshire Summer Assizes, 1840, when the jury, under the direction of the learned Judge (which was excepted to by both sides (2)), returned a verdict for the plaintiffs, damages 40s. This verdict was ultimately acquiesced in by the defendants.

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Andrews, Serjt., in Hilary Term last, on the part of Mr. Basham, obtained a rule calling upon Mr. A'Beckett to show cause "why he should not proceed to tax the plaintiffs' costs in this action, and issue execution against the defendants for the damages and costs herein; and why he should not pay to Mr. Basham, or his agent, out of the proceeds to arise upon such execution, so far as the same would extend, the sum of 57*l.* 10*s.* 11*d.*, the amount found by one of the Masters of this Court to be due to the said Mr. Basham, and for which he has a lien on the papers in this cause, pursuant to the said rule (of Trinity *Term, 1838); and why, in default of the said Mr. A'Beckett taxing the said costs, and issuing execution as aforesaid, the said Mr. A'Beckett should not deliver over to the said Mr. Basham the *Nisi Prius* record and *postea*, and all other papers in this cause and now in his hands, and the said Mr. Basham be at liberty to tax the said plaintiffs' costs and issue execution against the said defendants, the said Mr. Basham undertaking to pay to the said Mr. A'Beckett, or his agent, the proceeds to arise from such execution, after deducting the said sum of 57*l.* 10*s.* 11*d.*, as above mentioned.

Bompas, Serjt., now showed cause :

All that Mr. A'Beckett undertook by the rule of Trinity Term, 1838, was, to hold the record and papers in the cause subject to Mr. Basham's lien: he did not thereby bind himself to take any active measures to make that lien effective. At all events, Mr. Basham cannot be entitled to the gross proceeds that may arise from the execution: Mr. A'Beckett must be allowed first to deduct

(1) *Vide* 56 R. R. 491 (1 Scott, N. R. p. 502; 1 Man. & G. 648).

(2) *Vide* 56 R. R. 506, 507 (1 Scott, N. R. p. 500; 1 Man. & G. 669).

the costs incurred by him in conducting the cause to a successful termination. Mr. Basham is not to be placed in a better situation than he would have been in had he proceeded with the cause, and himself incurred those costs. Suppose, instead of a suit, the undertaking had related to a cargo of merchandize: would not the bailee or agent be entitled to deduct the expenses of sale? Why, then, should an attorney be in a better position? Besides, Newton has taken the benefit of the Insolvent Debtors Act; and this rule neither brings him nor his assignee before the Court.

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Andrews, Serjt., *contra*, was stopped by the COURT.

TINDAL, Ch. J.:

Looking at the whole of the transaction, and tracing all the steps of this most unfortunate cause, it seems to me that the undertaking of Mr. *A'Beckett, when he consented to become the attorney for the plaintiffs in place of Mr. Basham, was, that he should hold the papers subject to Mr. Basham's lien as against the plaintiffs, and should be answerable to him to the extent of such lien so far as the proceeds of any execution to be had against the defendants would extend. At the time the rule of Trinity Term, 1838, was made, Mr. Basham was not bound to give up the papers until his claim was satisfied: in handing them over to Mr. A'Beckett, therefore, he parted with a legal right. It is not for us to speculate upon what was then passing in the mind of Mr. A'Beckett. I think he is bound to carry in the record and proceed to the taxation of the costs, and to make the most of the judgment which the plaintiffs have obtained, satisfying Mr. Basham's lien out of the first proceeds.

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COLTMAN, J.:

I am of the same opinion. Mr. A'Beckett undertook the conduct of the cause upon speculation; and, if it has failed to be profitable, it is not through any default on the part of Mr. Basham. I think, however, the costs of the taxation should be paid before Mr. Basham's lien is satisfied.

ERSKINE, J.:

I am of the same opinion. The terms of the undertaking on the part of Mr. A'Beckett, were, that he should hold the record and papers subject to Mr. Basham's lien. It is said that that was merely an engagement that he would not part with the papers

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whilst Mr. Basham's lien remained unsatisfied. It appears to me, however, that that is by no means the fair result of Mr. A'Beckett's undertaking: but that he thereby engaged to do all that should be necessary to make that lien effective; and that for this purpose he is bound to carry in the record, tax the costs, and issue execution. It is further contended that the expenses incurred by Mr. A'Beckett in the conduct of the cause, being essential to its successful issue, and such *as Mr. Basham must himself have incurred had he continued to act as attorney for the plaintiffs, ought first to be allowed. But the costs incurred by Mr. Basham in the first instance were equally essential to the result as those incurred subsequently by Mr. A'Beckett. Upon the whole, I think, Mr. Basham paying the expenses attending the taxation, Mr. A'Beckett is bound to proceed and to give his assistance therein.

CRESSWELL, J., concurred.

Rule absolute—unless cause be shown to the contrary by the assignees of Augustus Newton, the plaintiff, within a week, upon notice of the rule being given to them.

1843.
Jan. 18.

Lord
LYNDHURST.
L.C.
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MORTIMER AND ANOTHER v. CRADOCK.

(12 L. J. C. P. 166—167; S. C. 7 Jur. 45.)

Trover—Conversion—Damages.

Where articles, forming an entire set (e.g. diamonds in the form of a diamond necklace), have been taken from the owner's custody without his knowledge, and a part of the set is proved to have been in the defendant's possession shortly after they were taken, and he cannot give any satisfactory proof of the mode in which they came into his possession: Held, that a jury, in an action of trover, may fairly be directed to presume that the whole set came to the defendant's hands; and that the full value of all the articles lost is a proper measure of damages.

TROVER for a diamond necklace.

Pleas—First, not guilty; second, that the plaintiffs were not possessed, &c.

At the trial, before Tindal, Ch. J., at the Middlesex sittings after Trinity Term, it appeared that the necklace in question, containing fifty-six brilliants, and of the value of 500*l.*, was missed from the premises of the plaintiffs, who were jewellers, on the 14th of October, 1840, having been last seen safe on the 10th. It was proved, that within three weeks from the time of the loss, the defendant sold to different parties diamonds, which had formed part of the necklace,

and which were clearly identified, to the value of 190*l*. On inquiry made by the police-officer as to where the defendant had procured the diamonds, he stated that he had some of them from a person of the name of Katz, and others from a person of the name of Wilson ; that he had no books containing any entries respecting them ; that Katz was introduced to him by Wilson, and that he could not say where the latter resided. There was also evidence of statements made by the defendant inconsistent with this account. Neither Katz nor Wilson were produced at the trial. The LORD CHIEF JUSTICE, after stating to the jury that they must, in order to find for the plaintiffs, be satisfied that the diamonds composed a part of the necklace, further proceeded to direct them, that the defendant was liable in trover for them, unless he had authority from the plaintiffs to deal with them. He further left it to them to say, whether a part only of the necklace, or the whole of it, came to the defendant's hands. The jury having given the plaintiff a verdict for 500*l*., being the whole value of the necklace,

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Channell, Serjt. obtained a rule *nisi* to reduce the damages to 190*l*., on payment of that sum into Court. Various affidavits were used in moving for the rule, showing that such persons as Katz and Wilson really existed at the time the alleged transaction with the defendant took place, but they contained no distinct statement on the part of the defendant, that the whole necklace had not come to his hands. In answer to those affidavits, affidavits were put in on the part of the plaintiffs, one by one of the plaintiffs, stating, that the defendant had told him, that he (the defendant) had left the stones with one Spires during his absence from town ; and another by a person who stated that, two days after the loss of the necklace, Spires had shown him between fifty and sixty diamonds, and said they were given him to sell.

Bompas, Serjt. (*Watson* was with him,) showed cause :

It would be difficult to contend, that there was not evidence enough to satisfy a jury, had the case been a criminal one. There was evidence, at all events, to *go to them, that the defendant was at one time, since the loss, possessed of the entire necklace.

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Channell, Serjt., *contra* :

The object of the defendant's affidavits was to show that there were two such persons as Katz and Wilson. If they could not be

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produced at the trial, the defendant had no means of verifying his own story. It is sworn that Katz is dead. The main question however is, whether the jury were warranted in finding the conversion of the whole, upon proof of the possession of a part. This is not like an indictment for felony.

(MAULE, J.: It is rather extraordinary that the defendant does not even now deny that he was in possession of the whole necklace.)

TINDAL, Ch. J.:

The defendant is quite silent on a point on which I certainly expected that some explanation would have been given. Some of the diamonds were clearly identified as being in his possession ten days after the loss or robbery, and there was evidence for the jury that all or most of the diamonds were in the possession of Spires two days after they were missed. The jury were satisfied that those which the defendant sold were part of the necklace. As against an evident wrong-doer, a jury may make every possible inference. In the well-known case of the chimney-sweeper's boy, *Armory v. Delamirie* (1), where a jeweller, under pretence of examining the weight of a jewel, took it from the finder, and did not restore it, and trover was brought, the CHIEF JUSTICE directed the jury, "that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages:" which they accordingly did. The inference the jury made here was certainly not stronger than they were directed to draw in that case.

ESKINE, J.:

I am quite of the same opinion. Here are fifty-six diamonds strung together in one necklace, and the whole are taken from the plaintiffs' shop. It is not impossible, indeed, that some person might have broken up that necklace, and sold part to one and part to another, and that the defendant might have had only a portion for sale; but supposing that the jury, as they seem to have done, came to the conclusion, that the defendant came dishonestly by a part, they were surely warranted in finding that he came equally so by the rest. I think also, that the affidavits strengthen the case against him.

MAULE, J. :

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I also think that the jury were right in giving damages for the whole when a part was traced to the defendant; but I further think, that if I had before entertained a doubt, it would have been removed by the defendant's own affidavit. He complains that the jury have given damages for some diamonds, of which he admits he was in possession, and for others, of which he was not in possession; and then, having an opportunity of making an affidavit, he makes one not denying his possession of the latter.

CRESSWELL, J. concurred.

Rule discharged.

IN THE EXCHEQUER CHAMBER (1).

GURR v. CUTHBERT.

(12 L. J. Ex. 309.)

1843.

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Trover—Lien—Conversion.

The plaintiff agreed to buy of the defendant a stack of hay for 86*l.*, to be paid for as taken away, and to be removed by the 31st of May. Part of the hay was removed and paid for by the plaintiff before the 31st of May, and in August the remainder was cut up and used by the defendant: Held, that as the defendant's lien on the hay was determined by the act of conversion, the plaintiff was entitled to the possession of the hay, and might maintain an action of trover.

TROVER for hay.

Pleas—First, not guilty; secondly, not possessed.

At the trial before Coleridge, J., at the Suffolk Spring Assizes for 1843, the following facts appeared. The defendant agreed to sell, and the plaintiff to buy, a stack of hay for 86*l.*, to be paid for as taken away, and to be removed by the 31st of May, 1841, the plaintiff to pay for the trussing. Part of the hay was removed and paid for by the plaintiff before the end of May, and in August the remainder was cut up and used by the defendant for his own purposes. No payment had been made of the entire value of the hay, but the amount was tendered in December. For the defendant it was contended that the plaintiff ought to be nonsuited, since, as the defendant had a lien upon the hay until the whole price was paid, he, and not the plaintiff, had the right of possession at the time of the conversion. The learned Judge refused to

(1) *Sic*, but the case here reprinted was obviously heard by the Court of Exchequer.—F. P.

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nonsuit, and the jury having, under his direction, found a verdict for the plaintiff, he gave the defendant liberty to move to enter a nonsuit, or a verdict for him.

Byles, Serjt. now moved accordingly :

The plaintiff ought to be nonsuited, since, as the price had not been paid, the defendant had a lien on the hay at the time of the conversion, and the plaintiff therefore had no right of possession. In this case, the action of trover cannot be maintained. To render a party amenable in trover, he must have dealt with the goods as his own: *Fouldes v. Willoughby* (1). The plaintiff might have brought an action on the contract, or a special action on the case on the bailment; but not being entitled to the possession of the hay at the time of the conversion, he cannot bring an action of trover. If the agreement to take away the hay before the 31st of May was a defeasance of the contract, the hay ceased to be the property of the plaintiff. He referred to *Stancliffe v. Hardwicke* (2), *Owen v. Knight* (3), and *Scott v. Newington* (4).

LORD ABINGER, C. B. :

We cannot grant a rule in this case. The stipulation that the hay shall be taken away before the 31st of May is not a condition precedent to the vesting of the property in the plaintiff, else the property would not vest before that day. Here there was an actual conversion, the effect of which was to entitle the plaintiff to the possession of the goods at the time of the conversion. He may therefore maintain an action of trover.

PARKE, B. :

I am of the same opinion. A lien is a mere right of possession ; but as soon as a party uses the goods in a manner inconsistent with his claim of lien, from that moment his lien ceases, and the right of possession of the other party revives. The defendant had a right, after the 31st of May, to remove the hay from the premises, but he could not consume it as he did without being guilty of abusing his lien.

ALDERSON, B. and GURNEY, B. concurred.

Rule refused.

(1) 58 R. R. 303 (8 M. & W. 540 ; S. C. 10 L. J. Ex. 364).

(2) 44 R. R. 649 (2 Cr. M. & R. 1 ; S. C. 4 L. J. (N. S.) Ex. 161).

(3) 4 Bing. N. C. 54 ; S. C. 7 L. J. (N. S.) C. P. 27.

(4) 42 R. R. 786 (1 Moody & Rob. 252).

MAGISTRATES' CASES.

REG. v. E. ROGERS AND OTHERS.

(12 L. J. M. C. 50—51.)

1843.

Jan. 25.

Bail Court.

[50]

Mandamus—Order of removal—Examination of pauper.

Where justices have examined a pauper as to his settlement, and have refused to make an order for his removal, this Court will not inquire into the discretion exercised by them.

Therefore, where the overseer of parish L. applied to justices for an order for the removal of a pauper to parish B., and the justices, having examined the pauper, refused to make the order, on the ground that the pauper had gained a subsequent settlement in parish L. in 1837, by paying rates, and serving the office of overseer there, the Court refused a *mandamus*, although the pauper could not, at that time, have gained a settlement in B. by those means.

This Court will not order justices to alter an examination of a pauper according to the facts, so as to make it sufficient evidence of a settlement.

JOHN JONES, a pauper, having, in September last, become chargeable to the parish of Llanvihangel Rhydithon, in the county of Radnor, in which parish he was then residing, one of the overseers of the poor of that parish applied to the defendants, who were justices of the peace of the county, and then holding a Petty Sessions at Knighton, in that county, to take the examination of the pauper, touching his settlement and that of his wife and family, and to make an order for their removal to the parish of Blethvaugh, in the same county, as the place of their last legal settlement. The justices thereupon examined the pauper, and then adjourned the consideration of the case until the next Petty Sessions. At the next Petty Sessions, held on the 1st of December, the justices refused to make an order for the removal, on the ground that the pauper had gained a subsequent settlement in Llanfihangel Rhydithon, in 1837, by renting a tenement and *paying parochial rates and taxes, and by serving the office of overseer. A subsequent application was made to the justices at their Petty Sessions, on the 12th of January, for a revision of this determination, on the ground that no settlement could now be gained by renting a tenement, unless (which the pauper denied,) there had also been a payment of the rent; nor since the statute 4 & 5 Will. IV. c. 76, could any settlement be gained by serving the office of overseer; the justices, however, refused to make any order. Another application for an order was made by letter to two of the refusing justices, but they again declined to interfere.

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The examination of the pauper, as to his residence, was as follows: "In 1818, I rented a messuage, farm, and lands in the

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parish of Blethvaugh, in the county of Radnor, of the late E. Barker, for nineteen years, at the rate of 16*l.* per year. I occupied the said farm and lands, and paid all rent for the same. In 1837 I occupied a messuage, farm, and lands in the parish of Llanfihangel Rhydithon, in the county of Radnor, of the late E. Barker, for five years, the rent I did not pay, but paid all levies and taxes for the same. I likewise served the office of overseer of the poor of the parish of Llanfihangel Rhydithon aforesaid, and in that year I paid from 12*l.* to 15*l.* for parochial rates, and I have done no subsequent act to gain a settlement that I know of." The copy taken by the clerk of the examination of the pauper, as to his settlement in Blethvaugh, was insufficient, as it did not show that the pauper had resided in Blethvaugh, or that he had become chargeable; but the affidavits upon which the rule was moved, mentioned that both these facts had been stated by the pauper, but had been omitted from inadvertence to be taken down in writing.

Davis now moved for a rule, calling upon the defendants to show cause why a *mandamus* should not issue, commanding them to take the examination of the pauper touching the last legal place of settlement of himself, his wife, and children, and if it should appear that their last legal place of settlement was in the parish of Blethvaugh, to grant an order for their removal to that parish. The justices were bound to make an order, and, as they have refused, the applicants have no remedy but by *mandamus*. * * *

WILLIAMS, J. :

I cannot interfere in the manner proposed. I do not agree that this is a ministerial act. The justices are to form their judgment upon the evidence which is before them. A *mandamus* goes where justices refuse or neglect altogether; and if two or more justices had perversely refused to take the examination of the pauper, it would have been different; but here there has been an examination, and a great part of the observations which have been made, have reference to the erroneous judgment which, it is alleged, has been pronounced. Here, therefore, the magistrates have entered upon their duty; and how can I say that I ought to set them right by *mandamus*, when, if the case were returned to them, the result might be the same? In a case (1), where an application was made

(1) *Rex v. Barnstaple*, 1 Barnard. 137.

to the Court for a *mandamus* to compel overseers to make an equal rate, the Court held, that although they would grant a *mandamus* to overseers to make a rate if it were necessary, yet they could not grant a *mandamus* to make an equal rate, because it is presumable, that if the justices began to do their duty, they would continue to do it.

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Davis then submitted, that a *mandamus* might be granted, to compel the justices to make such an addition to the examination as would make the examination sufficient evidence of a settlement.

WILLIAMS, J. :

No ; I cannot interfere.

Rule refused.

THE INHABITANTS OF LITTLE BOLTON v. REG.

(12 L. J. M. C. 104—109.)

1848.
June 29.

[104]

Highway—Prescriptive liability to repair—Discharge.

By an Act for more effectually cleansing, lighting, and watching, &c. the township of Little Bolton, it was enacted, by section 63, "That the trustees or Commissioners of such of the several turnpike roads, as pass within the township of Little Bolton, should be exonerated and discharged from the repairs of such parts of the said roads respectively as lie within the township of Little Bolton, and the same should from thenceforth cease to belong to the said turnpike roads, or to be under the controul of the trustees thereof, and *should thereafter be repaired, maintained, &c. by the trustees for executing that Act ; Provided, that such portion of the turnpike roads, leading from &c., to &c., as passes and lies within the said township of Little Bolton, should, until such portion of such last-mentioned turnpike road, by the erection of houses and buildings on each side thereof, be made to form a street, communicating with the present public street called Chorley Street, in Little Bolton aforesaid, belong to such last-mentioned turnpike road, and be under the management of the trustees, and should be kept in repair and maintained by the trustees, in the same manner as they would have been liable to maintain the same, in case that Act had not been passed."

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It was further enacted, by section 64, "That every person who should be rated or assessed, for the purposes of that Act, in respect of any messuage, building, land, tenement, or hereditament, within the said township of Little Bolton, should be, in respect of the same messuage, &c. exonerated, released, and discharged from the payment of all rates and assessments whatsoever, and performance of statute duty, or composition for the same, for or in respect of the repair and amendment of all or any of the public highways in the said township of Little Bolton, or any costs, charges, or burthens in respect thereof."

Upon the trial of an indictment against the inhabitants of the township of Little Bolton, for the non-repair of a highway, (authorized to be made under a former Act and the recited Act,) within the township, the jury found specially, that the highway was out of repair ; that the township of Little

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Bolton, until the passing of the Act above set out, had been used to repair such of the highways within it as would otherwise be repairable by the inhabitants of the parish at large; and that the portion of the road indicted, at the time of making the presentment, was not, by the erection of houses and buildings on each side thereof, made to form a street communicating with a certain public street called Chorley Street: Held, that the inhabitants of the township were liable to the repair of this highway, notwithstanding the provisions of section 64.

ERROR from the Quarter Sessions for the borough of Bolton.

The record set out an indictment and subsequent proceedings against the inhabitants of the township of Little Bolton, for not repairing such portion of a road leading from the town of Bolton-in-the-Moors, to a place called Nightingales, near to Chorley, as lay within the said township of Little Bolton. [The form of the indictment, which is stated in the original report, was in the judgment of the Court not material.]

[107] This case was argued, upon a former day in this Term (June 16), by

Crompton, for the plaintiffs in error, who relied upon *Rex v. The Inhabitants of Sheffield* (1), and by

Cowling, for the Crown. * * *

Cur. adv. vult.

[108] LORD DENMAN, Ch. J. :

This was a writ of error, on the part of the inhabitants of the township of Little Bolton, in the county of Lancaster, upon an indictment against them for not repairing a public highway, situate within the same, and found by the special verdict to have been out of repair. Nothing turns upon the form of the indictment, to which no objection was raised, and which we presume, therefore, is unobjectionable. The question (and it is one of very considerable difficulty,) arises on the construction of two Acts of Parliament, more especially the latter of those Acts. By 5 Geo. IV. c. cv., certain powers were vested in trustees, for the purpose of enabling them more effectually to repair certain roads therein specified, and also to make certain roads therein also described. It was followed by the Act of the 11 Geo. IV. c. xlvi., An Act for more effectually cleansing, paving, lighting, watching, regulating and improving the township of Little Bolton; and by the 63rd section of that Act, the trustees or Commissioners of the several turnpike roads within the

said township (with certain exceptions not material to the present purpose,) are exonerated and discharged from the repairs of such parts of the said roads as lie within the said township, and the same shall be from time to time thereafter repaired, maintained, supported, and kept in repair by the trustees for executing the latter Act. Then follows a provision, that such portion of the turnpike road (and here the road is described, and by the special verdict appears to be the road in question,) as passes and lies within the said *township of Little Bolton, shall, until such portion of such last-mentioned turnpike road, by the erection of houses and buildings on each side thereof, be made to form a street communicating with the present public street called Chorley Street, belong to such last-mentioned turnpike road, and be under the controul and management of the trustees, or Commissioners thereof, and shall be kept in repair and maintained by the trustees or Commissioners thereof, in such and the same manner as if the latter Act had not passed. The special verdict finds, that the road in question in the last-mentioned proviso specified, has not yet been made to form a street communicating as aforesaid, and, consequently, is not brought within the operation of such latter Act, but remains under the controul and management of the trustees of the turnpike roads. Then follows the 64th section, upon which the question mainly turns: "Provided always, and be it further enacted, that every person who shall be rated or assessed for the purposes of this (the latter) Act, for or in respect of any messuage, building, land, tenement, or hereditament, within the said township of Little Bolton, shall be, in respect of the same, exonerated, released, and discharged from the payment of all rates and assessments whatsoever, and performance of statute duty, or composition for the same, for or towards, or in respect of the repair and amendments of all or any of the public highways in the said township, or any costs, charges, or burthens in respect thereof." The point to be decided is, whether the words of the above section, which are certainly very large and general, constitute a defence to the indictment. We have said, the question turns on this section, because the bare circumstance of the roads in the township, including the indicted road, being under the management of trustees, would in itself constitute no defence. Several cases were cited at the Bar in support of this proposition (1),

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(1) *Rea v. St. George, Hanover Square*, 4 B. 13 B. B. 792 (3 Camp. 222); *Rea v. The Inhabitants of Oxfordshire*, 4 B. & C. 194; *S. C.* 3 L. J. K. B. 128. *Netherthong*, 2 B. & Ald. 179; *Rea v.*

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but inasmuch as it was not doubted or disputed in the argument, we do not deem it to be needful particularly to advert to them. The road, as has been noticed above, has not hitherto been brought at all within the operation of the latter Act, and whether it ever may be so, must remain, at least, in some uncertainty; there is no mode of compelling the completion of the street, by which alone the liability of the trustees under the latter Act can be made to attach: in the meantime, the road, as is found by the special verdict, remains out of repair; the ordinary and customary remedy of the public is indefinitely suspended, and none other is with any degree of certainty, at least, pointed out. We are aware that the case of *Rex v. The Inhabitants of Sheffield* was referred to by the learned counsel for the defendants below. That, however, is of a very peculiar description, and we do not think it was incumbent on the prosecutor to act upon it as a precedent. This is a very anomalous state of things, which except under the pressure of the plainest meaning of the Act, this Court ought not to sanction or allow. It may be, that the words of the 64th section, general as we have found them to be, might be meant only to be applicable when the operation of the Act as to this particular road shall commence. It is said, that the defendants, if convicted, have no remedy over against the rest of the inhabitants, by reason of the 64th section. There may be a difficulty arising from this circumstance, but it is countervailed by the mischief of preventing the ordinary remedy by indictment: and further, if there be any difficulty as to the remedy of the persons indicted, it arises from the doubtful state in which the law is left by the Acts of Parliament bearing upon the subject. It is further to be observed, that although, by the 64th section, persons contributing under that latter Act are exempt from contribution of every sort towards the repairs of highways, yet they are not expressly exempted from indictment in cases of non-repair.

Upon the whole, although the question is certainly one of considerable difficulty, our opinion is, that our judgment ought to be for the Crown.

Judgment for the Crown.

IN THE QUEEN'S BENCH.

REG. v. THE JUSTICES OF RADNORSHIRE.

(9 Dowling, Pr. Cas. 90—99.)

1840.

[90]

In an order by magistrates, under the Distress for Rent Act, 1737 (11 Geo. II. c. 19), s. 4, it is necessary that the offence should be charged to have been committed "wilfully and knowingly."

V. *WILLIAMS* and *Gray* showed cause against a rule *nisi* obtained by *Butt*, for issuing a *certiorari* to remove an order, or conviction of a person named *Cranmer*, before certain justices of Radnorshire, for assisting a person named *Morgan*, in fraudulently and clandestinely removing his goods, contrary to the provisions of 11 Geo. II. c. 19, in order to prevent their being distrained for rent. The order had been confirmed, on appeal, by the Court of Quarter Sessions. The proceedings were taken under section 4 of the statute, as the amount of the goods removed did not exceed 50*l.* The information, on which the conviction was founded, was in the following form :

"Radnorshire to wit. Be it remembered, that this 29th day of February, in the year of our Lord, 1840, Richard Morgan, of Nantmel, in the county of Radnor, carpenter, complaineth that John Cranmer has fraudulently and clandestinely removed and carried away certain goods and chattels of the said John Cranmer, not exceeding the value of 50*l.*, from certain premises at Bryn, in the parish of Nantmel, in the said county, which premises were demised to the said John Cranmer, at the yearly rent of 38*l.*, payable half yearly, viz. on the 29th of September, and the 25th of March, to prevent the said Richard Morgan from distraining the said goods and chattels for arrears of rent, amounting to 99*l.*, due to the said Richard Morgan from *the said John Cranmer, for the said premises, on the 29th day of September last; and that William Morgan, of Abercamle, in the parish of Llandewy Ystradlenny, in the said county, farmer, wilfully and knowingly aided and assisted the said John Cranmer, by fraudulently and clandestinely receiving and concealing the said goods and chattels, contrary to the form of the statute in that case made and provided.

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"Exhibited at the 29th day of February, 1840, before Thomas Prickard, Esq., a justice of the peace for the county of Radnor, residing near the place from whence the said goods and

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chattels were removed, and not being interested in the said premises whence such goods and chattels were removed.

“THOMAS PRICKARD,
“RICHARD MORGAN.”

On this information, a conviction proceeded, which was as follows:

“Radnorshire to wit. Be it remembered that on the 29th day of February, A.D. 1840, at Deria, in the county of Radnor, Richard Morgan, of Parke, in the parish of Nantmel, in the same county, carpenter, in his own person, came before me, Thomas Prickard, Esq., one of her Majesty’s justices of the peace in and for the said county, residing near the place from whence the goods and chattels hereinafter mentioned were removed, and not being interested in the lands or premises whence such goods and chattels were removed, as hereinafter mentioned, and informed me, in writing, that John Cranmer, of Bryn, in the parish of Nantmel, in the county of Radnor, farmer, held and enjoyed a certain farm, lands, and premises, with the appurtenances, called Bryn, situate in the parish of Nantmel, in the county of Radnor, as tenant thereof, to the said Richard Morgan, under a demise thereof, theretofore made at the yearly rent of 88*l.*, payable half yearly, to wit, on the 29th day of September, and the 25th day of March, by even and equal portions, and that on the 29th day of September, *A.D. 1839, the sum of 99*l.* was, and on the 12th day of February still was due, in arrear, and unpaid from the said John Cranmer to the said Richard Morgan; and that the said sum of 99*l.*, the rent aforesaid, being due, in arrear, and unpaid from the said John Cranmer to the said Richard Morgan, the said John Cranmer afterwards, that is to say, on the 12th day of February, A.D. 1840, fraudulently and clandestinely conveyed away and carried off and from the said demised premises, three cows, two yearlings, and one filly, being the goods and chattels of the said John Cranmer, and the same not exceeding the value of 50*l.*, but being of less value, to wit, of the value of 35*l.* 15*s.*, of lawful money of Great Britain, to prevent the said Richard Morgan from distraining the same for the said arrears of rent, and that William Morgan, of Abercamle, in the parish of Llandewy Ystradlenny, in the said county of Radnor, on the same day and year last aforesaid, at the parish of Nantmel aforesaid, in the county aforesaid, did wilfully and knowingly aid and assist the said John Cranmer in such fraudulent and clandestine

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conveying and carrying away and concealing the said goods and chattels, and every part thereof, contrary to the form of the statute in that case made and provided. Whereupon the said William Morgan, after being duly summoned to answer the said charge contained in the said information, appeared on the 18th day of March, in the year aforesaid, at Rhayaden, in the said county, before us, T. Lewis Lloyd and Thomas Prickard, Esqs., two of her Majesty's justices of the peace in and for the said county, and residing near the place from whence the said goods and chattels were removed, and not being either of us interested in the said premises whence the said goods and chattels were removed, and we, the said justices, having duly examined the facts, and all proper witnesses, upon oath, and it appearing and being fully proved, upon oath, before us, that the said William Morgan did, on the said 12th day of February, in the year aforesaid, aid and assist the said John Cranmer in fraudulently *and clandestinely removing and carrying away the said goods and chattels, and concealing the same as aforesaid, being of the value of 85*l.* 15*s.*, to prevent the said Richard Morgan from distraining the said goods and chattels for the said arrears of rent, contrary to the statute in that case made and provided. We, the said justices, do, therefore, determine and adjudge that the said William Morgan is guilty of the offence with which he is charged as aforesaid, and he is accordingly by us convicted thereof, and we do hereby order and adjudge him to pay the sum of 71*l.* 10*s.*, being double the value of the said goods and chattels, to the said complainant, on or before the day of in the year aforesaid.

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“ Given under our hands and seals, at Rhayaden, the day of March, 1840.”

A variety of objections had been taken to the order, but the principal one was, that it did not sufficiently appear, on the face of the order, that the defendant, against whom the complaint was brought, had knowingly and wilfully assisted in the removal of the goods. On that point it was to be observed, that whatever might be the construction put on the instrument in question, if it was a conviction, the same particularity was not necessary in this case, because it was a mere order and not a conviction. In point of law, a great distinction existed between an order and a conviction. A conviction might be drawn up at any time, after the justices had pronounced their decision ; but orders must be drawn up before

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they were acted upon. Good reason, therefore, existed for the rule of construction which prevailed, that the Courts were disposed to be more strict in construing convictions than in construing orders. In the case of *Rex v. The Justices of Cheshire* (1), it was held, that an adjudication of justices under 11 Geo. II. c. 19, s. 4, inflicting penalties for fraudulently removing goods to avoid a distress, is an order, and not a conviction, and cannot, therefore, *like a conviction, be returned to the Sessions in an amended form. So in *Rex v. Bissex* (2), it was held only to be an order. With respect to the strictness required in an order, in contradistinction to an indictment, or a conviction, the case of *Rex v. Middlehurst* (3) was a direct authority. There, it was held that an order of Sessions on the statute in question, which charged the offence in the alternative, was good. Lord MANSFIELD said, "upon indictments it has been so determined, that an alternative charge is not good ;" as "forged, or caused to be forged ;" though one only need be proved if laid conjunctively (as "forged, and caused to be forged"). But I do not see the reason of it: the substance is exactly the same; the defendant must come prepared against both; and it makes no difference to him in any respect. But this is an order; and, being good in substance, needs not be so literally strict. So, in *Rex v. Venables* (4) it was held, that if a justice is empowered to make an order for suppressing ale-houses, and on disobedience to make an order for the commitment of the offender, the latter order is not to bare execution of the first. The justice is punishable if he make the latter order without summoning the offender; but it is not necessary that he should set forth in the order that he did so. There, the Court held, that "they would intend the justices having jurisdiction had proceeded regularly, and that there was a summons." Here, also, it would be intended that the justices had proceeded regularly, and according to law, and it must, therefore, be intended that as the justices had ordered the payment in question to be made by the defendant, they had received proof that he wilfully and knowingly assisted the tenant in the removal of the goods. In *Rex v. Rabbitts* (5), it was held, that an order and adjudication founded on 11 Geo. II. c. 19, s. 4, for fraudulently and clandestinely *removing goods and chattels, not exceeding the value of 50*l.*, to avoid a distress for rent, need not enumerate or

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(1) 39 R. R. 518 (5 B. & Ad. 439).

(3) 1 Burr. 399.

(2) 1 Burr's Justice, by Chitty, 1129, ed. 28.

(4) 2 Ld. Ray. 1405.

(5) 28 R. R. 542 (6 Dowl. & Ry. 341).

specify the particular goods and chattels alleged to have been removed. By the express principle of law, as well as on the cases cited, it was clear that it would have been enough for the justices to have found that the defendant was guilty, and then convicted him accordingly. The order might have stated the information, and then have proceeded to allege that the justices had examined all proper witnesses, and then have found the defendant guilty. It was objected that they ought to proceed to state how they found the defendant guilty. That was not, however, necessary to be stated by them more than by a jury. In the form given in Burn's Justice, title "Distress," the evidence is directed to be set out, and that might be necessary, if the order in this case was a conviction. But being an order, if the party had been merely found guilty by the magistrates, that would have been sufficient.

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Butt, in support of the rule, submitted, that as the order did not contain any allegation that the defendant did wilfully and knowingly aid and assist, the order charged no offence to have been committed. [He cited *Rex v. Rabbitts* (1), *Rex v. Davis* (2).]

Cur. adv. vult.

WILLIAMS, J. :

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The following proceedings, founded on the 11 Geo. II. c. 19, were removed into this Court (here his Lordship read the information and conviction). The provisions of the statute applicable to this case are, first, sect. 1, which empowers landlords, in case any tenant "shall fraudulently or clandestinely convey away or carry off or from" the premises demised, "his goods or chattels, to prevent the landlord from distraining the same for arrears of rent, within the space of thirty days next ensuing such conveying away, or carrying off, such goods or chattels, to take and seize such goods and chattels wherever the same shall be found, as a distress for the said arrears of rent." By sect. 3, it is provided, that in order "to deter tenants from fraudulently conveying away their goods and chattels, and others from wilfully aiding or assisting therein, or concealing the same," "that if any person or persons shall wilfully and knowingly aid and assist any such tenant or lessee in such fraudulent conveying away, or carrying off, any part of *his or her goods or chattels, or in concealing the same, all and every person and persons so

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(1) 28 R. R. 542 (6 Dowl. & Ry. 341). (2) 39 R. R. 563 (5 B. & Ad. 551, 554; 2 Nev. & Man. 349).

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offending, shall forfeit to the landlord or landlords, lessor or lessors, from whose estate such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him, her, or them respectively carried off or concealed as aforesaid." By sect. 4 it is enacted, "that where the goods and chattels so fraudulently carried off or concealed, shall not exceed the value of 50*l.*, it shall and may be lawful for the landlord or landlords, from whose estates such goods and chattels were removed, his, her, or their bailiff, servant, or agent, in his, her, or their behalf, to exhibit a complaint in writing against such offender or offenders, before two or more justices of the peace of the same county, riding, or division of such county, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being interested in the lands or tenements whence such goods were removed; who may summon the parties concerned, examine the fact, and all proper witnesses upon oath, or if any such witness be one of the people called Quakers, upon affirmation required by law; and in a summary way determine whether such person or persons be guilty of the offence with which he or they are charged: and to inquire in like manner of the value of the goods and chattels by him, her, or them respectively so fraudulently carried off or concealed as aforesaid; and upon full proof of the offence, by order under their hands and seals, the said justices of peace may, and shall adjudge the offender or offenders to pay double the value of the said goods and chattels to such landlord or landlords, his, her, or their bailiff, servant, or agent, at such time as the said justices shall appoint; and in case the offender or offenders, having notice of such order, shall refuse or neglect so to do, may and shall, by warrant under their hands and seals, levy the same by distress and sale of the goods and chattels of the offender or offenders; and for want of such distress, may commit the offender or offenders to the house of correction, there to be kept to *hard labour, without bail or mainprize, for the space of six months, unless the money so ordered to be paid as aforesaid, shall be sooner satisfied." During the argument, several objections were raised, into which I do not think it necessary to enter. The answer to them all depended mainly upon a distinction taken between an order and a conviction, and the leaning which the Court showed, in order to sustain the former, in contradistinction to the latter. In the case of *Rex v. Davis*, it is called an order, and was so decided to be in the case of *Rex v. Bissex*. The judgment in that case, to a certain extent, depended

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on that point. It is, however, to be observed, that the terms “offender” and “offence” are used in the Act, and sufficient penal consequences may follow the decision of the justices. It also appears that in an earlier case of *Rex v. Morgan* (1), it is styled a conviction. So also in Burn’s Justice, there is a very careful and accurate form given, in which the decision of the magistrates is treated as a conviction. Upon this distinction, however, too much reliance ought not to be placed. Admitting the general rule, which is confirmed by many cases, that a conviction should be construed strictly, and an order liberally, the value of that rule is greatly diminished by the difficulty of applying it to each particular case. I much doubt whether, upon examination, there will be found any rule of law which prescribes, or even allows, language to be forced from its ordinary import and fair meaning, to support one instrument or to invalidate the other. Since the case of *Rex v. Hulcott* (2), which has been recognized in many subsequent and recent decisions, it may be questioned whether any intelligible distinction exists at all. The principal objection, however, was as to the sufficiency of the complaint. It is quite clear that the justices, who are to make the order upon the party to pay the money, are entrusted with the powers of the Act, and the party is not to be convicted, and the order is not to be made, except * “upon full proof of the offence.” It has been already noticed, that the form in Burn pursues the formalities of a conviction in setting out the evidence. The case of *Rex v. Bissex*, before cited, decides that that is not necessary. But without interfering with that case, or questioning its authority, another consideration arises. The order does not state that the justices, having summoned the offender and heard evidence upon oath, adjudged the complaint to be true, if that would have been sufficient, which it is not necessary to decide; but a different course has been pursued. It does specify what was the full proof of the offence; but it does not thereby appear, by direct averment, that it was proved before the justices, that the party convicted, “wilfully and knowingly” assisted in the removal of the goods; nor is there any statement of evidence given before the justices, from which it can by any intendment be inferred that he did so assist. Without such evidence, no offence could have been committed. It seems to me, therefore, that the order is defective, and must, consequently, be quashed.

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Rule absolute.

(1) Caldecott, 156.

(2) 6 T. R. 583.

1840.

BECK *v.* CLEAVER.

[111]

(9 Dowling, Pr. Cas. 111—114.)

In an action on an attorney's bill, plea, *nunquam indebitatus*, it is competent for the plaintiff to show that a greater amount is due to him than the Master allowed on taxation, pursuant to an order for changing the attorney in the course of the cause, in which the costs were incurred.

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R. V. RICHARDS and *Miller* showed cause against a rule *nisi*, obtained by *Macaulay*, for setting aside the verdict, which had been found in favour of the plaintiff, and for a new trial, on the ground of misdirection. It was an action by an attorney for the recovery of his bill of costs, and was tried before the under sheriff. The defendant pleaded, first, *nunquam indebitatus*; secondly, as to 4*l.*, a tender and payment into Court; thirdly, as to 3*l.* 15*s.* 8*d.*, that no signed bill had been delivered. It appeared that the bill was incurred in an action of *West v. Cleaver*. The present plaintiff, Beck, acted in that case as the attorney of Cleaver. The latter applied for an order in that action to change his attorney, Beck. He obtained the usual order on payment of costs, to be taxed by the Master. Before that officer it became a question as to when the retainer of the attorney was revoked, and, consequently, whether certain *items, amounting to the sum of 3*l.* 15*s.* 8*d.*, ought to be allowed. The Master was of opinion that those sums ought to be disallowed, and accordingly gave his allocatur for the sum of 4*l.* The client, therefore, only tendered that sum. This was refused, and a signed bill, including the 4*l.* and the 3*l.* 15*s.* 8*d.* was delivered. After the expiration of a month the present action was brought. Between the delivery of the bill and the bringing of the action no application was made to tax. On the trial of the action the same question was submitted to the jury, as to when the retainer was revoked. The assessor of the sheriff told the jury that the Master's allocatur was strong evidence as to what was due to the plaintiff, but it was not conclusive. The presumption was, that the jury thought the retainer was revoked at a time subsequent to the finding of the Master, and accordingly gave a verdict for the amount of the disputed items. The question turned upon the effect of the plea of *nunquam indebitatus*, and was, whether, under such a plea it was competent for the defendant to set up the Master's allocatur as conclusive on the plaintiff, with respect to the amount of his bill. It was submitted that he could not. The amount of the taxation by the Master might, in general, be conclusive on the parties, as to the amount

due, but could not be so regarded on the plea of *nunquam indebitatus*. It might, as the assessor of the sheriff had said, be strong evidence that no more was due, but it was not conclusive. On this plea, however, the defendant had not placed himself in a situation to estop the plaintiff by the allocatur. In order to do so, he should have pleaded it; not having pleaded it, the allocatur only amounted to evidence. In *Vooght v. Winch* (1) it was held, that a verdict obtained by a defendant in a former action, and which, if pleaded in bar, would be an estoppel, when given in evidence under the general issue, is not conclusive against the plaintiff, but only evidence to go to the jury. *So in *Sybray v. White* (2) it was held, that the finding of a miner's jury, coupled with the declaration of the defendant, was admissible in evidence against the latter, but the Court intimated very strongly that the finding of the jury was by no means conclusive upon the party. In *Outram v. Morewood* and another (3) it was held, that if a verdict be found, on any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties, or their privies, in respect of the same fact or title. Here, Lord ELLENBOROUGH recognised the principle, that being pleaded, the verdict was an estoppel, but he did not decide, that if the plea of the defendant had been in the form of the present case, that it would have operated as an estoppel. For these reasons, it was submitted, that the direction of the sheriff's assessor was perfectly correct. It was to be observed, that this was not an order under 2 Geo. II., but one made in the course of the cause. Granting that the Master's allocatur might be conclusive with respect to the reasonableness of the charges, it was not conclusive on a matter of fact, as to when the retainer was revoked. There was no undertaking on the part of the client on obtaining that order to pay what was due, and was not binding on both parties. The effect of the order was not to deprive the attorney of his right of action, but was merely a condition imposed on the client, as the terms of getting his papers delivered up. For these reasons, the present rule ought to be discharged.

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[*113]

Macaulay, in support of the rule, contended, that the Master's decision, of which the allocatur was evidence, must be considered

(1) 21 R. B. 446 (2 B. & Ald. 662).

(3) 7 R. B. 473 (3 East, 346).

(2) 46 R. B. 342 (1 M. & W. 435).

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as conclusive with respect to the amount of the debt due. When an attorney accepted the retainer of a client, the substance of the contract was that he should accept for his services what the Master, on taxation, found to be due. Here, the attorney had admitted the jurisdiction *of the Master, for he had attended the taxation. If he objected to it, he should have repudiated the taxation, or have applied to this Court to set it aside. In *Whitehead v. Tattersall* (1), a covenantor and a covenantee submitted the amount of damages accruing from a breach of covenant to an arbitrator. It was held, that in an action on the covenant, the arbitrator's award was conclusive as to the amount of damages, unless the award itself could be impeached. So in the present case, there was nothing to impeach the allocatur. The amount found by it to be due must, therefore, be considered as conclusive upon the plaintiff as to what he was entitled to recover.

PATTERSON, J. :

It seems to me that the defendant has lost his advantage, by not doing anything between the delivery of the signed bill and the commencement of the action. I have considerable doubt whether such a taxation of the bill as this would be conclusive on either party. When the attorney delivered his bill, then the client should have applied to tax that bill ; but if he thinks proper to let the month go by, and then plead in this form to the declaration, he has lost his opportunity of taxing the bill. Then comes the question, whether, under the plea of *nunquam indebitatus*, he can give in evidence the Master's allocatur, as conclusive on the plaintiff? If the defendant pleads such a plea, it seems to me that he opens the whole question as to the amount of the plaintiff's claim. I cannot say that either party is concluded by the amount of the allocatur, and, therefore, I am of opinion that the direction of the sheriff's assessor was right, and, consequently, that the present rule must be discharged.

Rule discharged.

(1) 40 B. R. 342 (1 Ad. & El. 491).

REG. v. SOLLY AND ANOTHER.

1840.

(9 Dowling, Pr. Cas. 115—118; S. C. 1 W. P. C. 6.)

[115]

A notice of application for a writ of *certiorari* signed in the name of a solicitor, who describes himself "solicitor for the present churchwardens and overseers of Market Harborough" is sufficiently signed, pursuant to 13 Geo. II. c. 18, s. 5 (1).

J. BAYLEY showed cause against a rule *nisi*, obtained by *White*, which called upon the present overseers of the parish of Market Harborough, to show cause, why a writ of *certiorari*, which had been directed to the justices of Leicestershire, to bring up an order made by them in Quarter Sessions, should not be quashed *quia improvidè emanavit*, and why the overseers should not pay the costs of this application. Several objections were made to the issuing of the *certiorari*, the principal of which was that it did not appear by the notice required, in order to obtain the *certiorari*, what were the names of the parties applying; secondly, that the notice was bad, as being signed by the attorney of the parties applying, and not by the parties themselves; thirdly, that it was signed by a gentleman, who assumed to be solicitor to all the parties, whereas he was only solicitor to the churchwardens. First, as to the objection to the mode of signing the notice. By the 13 Geo. II. c. 18, s. 5, it was provided, "that no writ of *certiorari* shall be granted, issued forth, or allowed to remove any conviction, judgment, order, or other proceedings, had or made by or before any justice or justices of the peace of any county, city, borough, town corporate, or liberty, or the respective General or Quarter Sessions thereof, unless such *certiorari* be moved or applied for within six calendar months next, after such conviction, judgment, order, or other proceedings, shall be so had or made, and unless it be duly proved upon oath, that the said party or parties suing forth the same, hath or have given six days' notice thereof in writing, to the justice or justices, or to two of them (if so many there be), by and before whom such conviction, judgment, order, or other proceedings shall be so had or made, to the end that such justice or justices, or the parties therein concerned, may show *cause, if he or they shall so think fit, against the issuing or granting such *certiorari*." It would be observed, that the Act did not require that the notice should be signed at all. Here, however, it was signed by the attorney in his own name, and describing himself as

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(1) Repealed, Stat. Law Rev. Act, contained in the Quarter Sessions Act, 1842 (5 & 6 Vict. c. 48), s. 3.

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“solicitor for the present churchwardens and overseers of Market Harborough.” Then, as to the second objection, that the names of the parties applying for the *certiorari* were not stated. It was submitted, that it was not necessary that the christian and surname of the parties should be given. Two cases would be relied on by the other side, as showing that the notice must be so signed. The first of those cases was *Rex v. The Justices of Lancashire* (1). That case was clearly distinguishable from the present; for, the notice was there signed merely, “Lace, Miller, and Lace, attorneys.” From that signature it could not be known on whose behalf the notice was given. Here, however, the parties on behalf of whom the notice was given, were described. The other case was *Rex v. The Justices of Cambridgeshire* (2). There, the notice was signed “Thomas Wilkin, one of the churchwardens of the said parish,” and did not go on to state that it was given on behalf of the parish officers generally. That case was also very different from the present. With respect to the third point, that the solicitor was not authorised on behalf of the overseers and churchwardens, but merely on behalf of the churchwardens, the affidavits, in answer to the application, clearly showed that he was duly authorised to proceed both on behalf of the overseers and the churchwardens. For these reasons, the present rule ought to be discharged.

White, in support of the rule, contended, that by a reasonable construction of the 13 Geo. II. c. 18, s. 5, it was clear that the Legislature intended that the names of the parties prosecuting the *certiorari* should be stated at the *foot of the notice. * *

With respect to the objection, that the solicitor was not duly authorised to appear on behalf of both churchwardens and overseers, it would appear, from the affidavits, that no sufficient authority was given by them to him.

Cur. adv. vult.

PATTESON, J. :

The case of *Reg. v. The Justices of Lancashire* (3), is an authority to show that the signature by the solicitor is sufficient. Then I think, first, that the description of the parties, as overseers, without mentioning their names, they filling an official situation,

(1) 4 B. & Ald. 289.

(2) 37 R. R. 579 (3 B. & Ad. 887).

(3) 3 P. & D. 86.

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is sufficient. The only question then, is, whether the parties gave him authority to appear? And I think that on these affidavits there can be no doubt that an authority was given. The present rule must, therefore, be discharged with costs.

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Rule discharged, with costs.

SMITH v. CLARK.

(9 Dowling, Pr. Cas. 202—203.)

1840.

[202]

If a notice to quit is served on the tenant's wife, at the house, accompanied by a statement that the paper delivered, is "a notice of discharge," it is sufficient.

DUNDAS applied for a rule to show cause, why the verdict found in favour of the defendant, in this case, should not be entered for the plaintiff. It was an action of trespass tried before Coltman, J., at the Summer Assizes for Yorkshire. One issue on the pleadings was, whether a notice to quit had been duly served upon the plaintiff. The proof was, that the party who desired to effect the service had delivered the notice to the wife of the plaintiff, at the door of his house, at the same time stating, that the paper was "a notice of discharge," the question left to the jury was, whether they could infer from this evidence, that the notice had reached the plaintiff. The jury were of opinion that it had, and accordingly found the verdict on that issue, in favour of the defendant. It was now submitted that sufficient evidence had not been given of the notice having come to the hands of the plaintiff, and, therefore, that the jury were wrong in finding a verdict in favour of the defendant on the issue. He cited the case of *Doe d. Buross v. Lucas* (1) where it was held that the mere leaving of a *notice to quit at the tenant's house, without further proof of its being delivered to a servant, and explained, or that it came to the tenant's hands, is not sufficient to support an ejectionment. The case of *Jones d. Griffiths v. Marsh* (2), was to the same effect.

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LORD DENMAN, Ch. J. :

I think the service was clearly sufficient.

LITLEDAL, J., WILLIAMS, J. and COLERIDGE, J., concurred.

Rule refused.

(1) 8 R. R. 842 (5 Esp. 153).

(2) 2 R. R. 441 (4 T. R. 464).

1840.

[203]

IN THE MATTER OF ARBITRATION BETWEEN HIGHAM AND JESSOP.

(9 Dowling, Pr. Cas. 203—207.)

By an agreement of reference to arbitrators, with power to appoint an umpire, it was covenanted that the umpire should make his award two calendar months after his appointment. He was appointed on the 29th of June, and afterwards the time for making his award was enlarged by consent, for three months further. The Court held that the 29th of June was to be excluded from the calculation of time, and, therefore, that the award being made on the 29th of November, was made in due time.

[*204]

SIR W. FOLLETT and Addison showed cause against a rule nisi, obtained by Hoggins, for setting aside the award made in this case. A variety of grounds was stated in the rule, but that on which the Court proceeded was, that the award had been made by the umpire, after the expiration of the time limited by the agreement of reference for that purpose. It appeared, that the matters in dispute between the parties, had been referred by certain articles of agreement, bearing date the 11th of January, 1839, to two persons, who were appointed arbitrators, with power to appoint an umpire. The time limited in the agreement for making the award by the arbitrators was the 1st day of the following month of May. It was further witnessed that in case of disagreement between them, and the umpire made the award, it should be made "within two calendar months next after the said matters shall be referred to him." The *agreement did not grant any power either to the arbitrators or the umpire, for the purpose of enlarging the time to make their respective awards. The parties met on the 27th of April, and agreed to enlarge the time, within which the arbitrators were to make their award for three months. The arbitrators, on the 29th of June, not being able to agree, duly appointed an umpire. To him, the matters of difference were accordingly referred. The parties, afterwards on the 19th of August, gave to the umpire "the further period of three calendar months for making his award and umpirage, of and concerning the several matters so referred as aforesaid, in addition to, and in augmentation of, the time given to the said umpire for that purpose, by the within mentioned agreement." The umpire made his award on the 29th of November. Higham, the party against whom the award was made, wrote to the umpire on the 29th of November, informing him that that was the last day on which his award could be made. The objection was, that the award had been made without power on the part of the

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umpire, as it had been made after the time, within which it ought to have been made. In support of this objection, it was contended, that the umpire having been limited to make his award within two months after the matters were referred to him, and that reference had been made on the 29th of June, that day was to be taken into calculation, and, therefore, the two months mentioned in the agreement, expired on the 28th of the following August. It was further contended, that by analogous reasoning, the three months additionally given by the parties for making the award expired on the 28th of November. In answer to the rule, however, it was submitted, that the 29th of August could not be taken into the calculation of the time which had been granted in addition. To show this to be the rule, the cases of *Pellew v. The Hundred of Wonford* (1), *Hardy v. *Ryle* (2), *Watson v. Pears* (3), *Thomas v. Popham* (4), *Blunt v. Heslop* (5), *In the Matter of Hick* (6), and *Lawrence v. Hodgson* (7), were clear authorities. * * *

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Cresswell and *Hoggins* supported the rule, [citing *Lester v. Garland* (8)].

PATTESON, J.:

There was a case of *Williams v. Burgess* (9), decided in the full Court, in which it was held, that in reckoning the time within which a warrant of attorney must be *filed, pursuant to 8 Geo. IV. c. 29, s. 1 (10), the day of the execution is not to be included.

[*206]

Cresswell:

The present case was distinguishable from that, as by the express words of the Act of Parliament, the warrant of attorney is required to be filed within twenty-one days after its execution. That of course must mean from the act of execution itself. The day on which that was done must, of course, be excluded from the calculation, unless the Court took notice of the fraction of a day (11). As to

(1) 9 B. & C. 134; 4 Man. & Ry. 130; see 49 R. R. 693, 694.

(2) 9 B. & C. 603; 4 Man. & Ry. 295.

(3) 11 R. R. 712 (2 Camp. 294).

(4) Dyer, 218 b.

(5) 47 R. R. 664 (3 Nev. & P. 553; 8 Ad. & El. 577).

(6) 21 R. R. 511 (8 Taunt. 694).

(7) 30 R. R. 754 (1 Y. & J. 16).

(8) 10 R. R. 6 (15 Ves. 248).

(9) 12 Ad. & El. 635.

(10) Repealed, Stat. Law Rev. Act, 1873.

(11) In the case of *Chick v. Smith*, 59 R. R. 829 (8 Dowl. 337), it was held, that where a defendant died between 11 and 12 o'clock in the morning, and a writ of *fi. fa.* was sued out against his goods between 2 and 3 o'clock in the afternoon of the same day, the Court would set aside the writ as irregular.

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the letter written by Higham to the umpire, that could not authorise the latter to defer the making of his award until too late. All that the letter informed the umpire, was, that the 29th was the latest day for making the award, but did not state that it ought to be made sooner.

PATTESON, J.:

I have some doubt whether it is competent for Higham to take this objection at all, after giving notice to the umpire, that the 29th was the last day for making his award. But, looking at the documents in the case, I am of opinion, that the umpire had a right to make his award on the 29th of November. By the agreement of reference, it is provided, that the arbitrators shall, in the first instance, be bound to make their award by the 1st of May. Then, in case of their disagreement, they are to appoint an umpire. The time for making the award was then enlarged by the parties until the 1st of August. Within that enlarged time, the arbitrators appoint the umpire, that is to say, on the 29th of June, and the umpire was to make his award within two calendar months after the matter was referred to him. On the 19th of August the parties further enlarged the time given by the agreement for three *months. I think, that according to the authority of the cases cited, as to the calculation of time, the umpire was entitled to make his award on the 29th of November. It having been made on that day, it was made within the time limited by the parties, and, therefore, the present rule must be discharged.

Rule discharged, with costs (1).

1841.

[330]

KIRWAN v. GOODMAN (2).

(9 Dowling, Pr. Cas. 330—332; S. C. 5 Jur. 293.)

A warrant of attorney given by an attorney to induce a party to stay proceedings against him on a rule for striking him off the roll, is illegal and void, and the Court will direct it to be taken off the file and cancelled.

WHATELEY showed cause against a rule *nisi*, obtained by *Thesiger*, for taking a warrant of attorney given by the defendant off the file, and cancelling it, on the ground that the consideration on which it was founded was illegal. It appeared, by the affidavits,

(1) See *Young v. Higgon*, 8 Dowl. P. C. 212, as to the calculation of time in a notice of action against a magistrate. (2) See note to *Pool v. Bousfield* (1807) 10 R. R. 633.

that the plaintiff, Mrs. Kirwan, had employed the defendant as her attorney. In the course of this employment, he so far misconducted himself, that a rule was granted, requiring him to show cause, why he should not be struck off the roll of attorneys of this Court. While this rule was pending, Goodman applied to Mrs. Kirwan, to induce her not to prosecute her rule any further. In order to induce her to accede to his proposal, he offered her the warrant of attorney in question, which secured the payment of a considerable sum of money; this offer was accepted. The money was to be paid within a certain time. Not being so paid, Mrs. Kirwan became urgent for the liquidation of her claim. Goodman then obtained the present rule, to set aside the warrant of attorney, on the ground that the consideration on which it was founded was illegal. It was submitted, that the Court would not yield to such an application on the part of a person who had so improperly and unprofessionally conducted himself.

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Thesiger, in support of the rule, cited [*Collins v. Blantern* (1) and *Pool v. Bousfield* (2)].

Cur. adv. vult.

WILLIAMS, J. :

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This case has been brought before me, on affidavits, certainly of an enormous length, which set forth the transaction between the parties during a great number of years. The result of them is, that this warrant of attorney was given, in order to induce Mrs. Kirwan to drop her proceedings on a rule to strike Goodman off the roll. The case does not go so far as that of *Collins v. Blantern*, but comes within the principle of *Pool v. Bousfield*. The result of these authorities is, that it is contrary to the policy of the law that such a consideration should be allowed to prevail. If the attorney had misconducted himself in his professional capacity, and an inquiry was commenced, it ought to proceed. A warrant of attorney given for the *express purpose of stifling inquiry, it seems to me, cannot be allowed to stand. The present rule must, therefore, be made absolute.

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Rule absolute.

(1) 2 Wils. 341.

(2) 10 B. R. 633 (1 Camp. 55).

1841.

[334]

PRICE *v.* PRICE.

(9 Dowling, Pr. Cas. 334—335; S. C. 5 Jur. 6.)

The Court will not set aside the certificate of an arbitrator any more than an award, on the ground of a mistake as to the effect of evidence.

V. LEE moved for a rule to show cause why the certificate of the arbitrator in this case should not be set aside, on the ground that he had clearly committed a mistake, in the conclusion which he had drawn from the documents presented to him. The cause had been called on and had proceeded some way, when it appeared that the issue between the parties depended on a matter of account. It was then suggested, that it should be referred to a gentleman at the Bar. The suggestion was adopted, and it was agreed, in order to avoid expense, that he should give a certificate instead of making an award. The parties appeared before him, and the plaintiff having proved his case, the defendant produced certain receipts, which applied to other matters than those for which the plaintiff claimed. The arbitrator, however, misunderstood the effect of the receipts, and certified that the plaintiff had no cause of action. This conclusion was clearly a mistake, and was quite contrary to the evidence in the cause. The object of the present application was to set aside that certificate. No doubt the general rule was with respect to awards, that where an arbitrator had made a mistake as to the merits of the case, the parties were still bound by his decision. The case of a certificate, however, it was submitted, differed from that of an award. In an award, the arbitrator pronounced both on the law and the evidence, and, therefore, assumed the situation of both Judge and jury. In the case of a certificate, however, he was merely put in the situation of the jury. His decision, therefore, as to the facts, must be liable to revision, in the same manner as the verdict of a jury. If the jury gave a verdict against evidence, the Court would correct their error; the arbitrator being placed in the same situation as the jury, when he gave a certificate, his erroneous decision must be equally liable to correction.

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WILLIAMS, J. :

The matter in question has been referred to an arbitrator, who is a judge chosen by the parties themselves. They must, therefore, abide by his decision, although he may have made a mistake. That has been clearly determined in a variety of cases. There is no

distinction between a certificate and an award, and, therefore, the parties must abide by the decision of the arbitrator so pronounced. You will, therefore, take no rule.

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Rule refused.

HILL v. SLOCOMBE.

(9 Dowling, Pr. Cas. 339—340; S. C. 5 Jur. 120.)

1841.

[339]

Where it is sought to draw up a rule for an attachment for non-performance of an award, it is competent for the officer of the Court to object to the absence of a stamp on the award, and, therefore, to refuse to draw up the rule.

V. WILLIAMS applied to the Court for its direction to the proper officer, to draw up a rule for an attachment for the non-performance of an award. On inspecting the award, the officer observed that it was unstamped. He, therefore, declined drawing up the rule, without the direction of the Court for that purpose. It was submitted, that the officer had no right to take the objection. The party applying for the attachment had taken his chance that no objection would be made by the opposite party, on the ground of a defect of stamp, and if he did not take the objection, it was not competent for the officer to take it. At Nisi Prius, a Judge trying a cause, would not take the objection. If the Judge would not, how could the officer? But if the officer was allowed to enter into the question as to whether the instrument was duly stamped, he might also object to the amount of the stamp. If he did, how would it be possible to show cause against his objection, or how could the question be argued? It had been suggested that the officers of the Court were bound to take notice of the absence of stamps, when stamps were required on legal proceedings. That, however, was a very different case. The Court would be bound, as a matter of course, to take notice of its own proceedings, and to see that they were in the legal form. But the proceedings on an award were very different, as they were merely incidental to the proceedings of the Court. Besides, the award, on which the present attachment was moved, might be a duplicate of the award, when, of course, no stamp on it would be required. The presumption was, that the award was such a one as *would be legal, although no stamp was upon it. If so, then this award would be presumed to be a duplicate, until the contrary be shown by the opposite party.

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Cur. adv. vult.

WILLIAMS, J. :

I have spoken to the other Judges on this case, and have stated the

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 v.
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arguments urged in support of the application, and more especially that with respect to the practice of a Judge at *Nisi Prius* not taking notice of the absence of a stamp, unless the defect is pointed out by the opposite party. They think that the state of the documents being mentioned by the officer of the Court, when the documents are handed in, is equivalent to an intimation, which compels them to consider whether the documents are in a state to authorize the drawing up of the rule. We are all of opinion that it was not in such a state. The rule for an attachment, therefore, cannot be drawn up on this award, which is unstamped.

Application refused.

1841.

[341]

ARCHER v. OWEN.

(9 Dowling, Pr. Cas. 341—343; S. C. 5 Jur. 340.)

An action of trespass was referred by order of *Nisi Prius*. The defendant pleaded, first, not guilty, and secondly, a justification. The arbitrator awarded "that as the defendant has not proved his plea, the verdict for the plaintiff ought to stand," and then stated a number of reasons for his opinion, which could not be considered as satisfactory. The Court held the adjudication sufficient, and declined to consider the sufficiency of the reason assigned by the arbitrator.

INGHAM showed cause against a rule *nisi*, obtained by *Wightman*, which called upon the plaintiff to show cause, why the award in this case should not be set aside on various grounds. The principal one was, that the award was uncertain. It was an action of trespass, and the defendant pleaded, first, not guilty; secondly, a justification. The cause came on for trial, and being referred, a verdict was taken in favour of the plaintiff, subject to a reference. The arbitrator held several meetings, and subsequently made his award. No power was reserved to the arbitrator to raise any question for the opinion of the Court. By the award, the arbitrator found, "that as the defendant has not proved his plea, the verdict ought to stand." The arbitrator then proceeded to set forth the reasons which induced him to come to the conclusion he had. Those reasons were not satisfactory. He did not set forth the evidence which had been adduced before him. *Ingham* contended, that the award was sufficiently certain. The arbitrator had not found in direct terms that the trespass had been proved by the plaintiff, but he found that which must be considered as equivalent to such a finding; it was not to be presumed that the arbitrator would be so unjust as to determine that the defendant could be required to show a justification for a trespass which had not been committed. It was

enough if sufficient appeared on the face of the award to show that the arbitrator had adjudicated on the cause referred to him. In the case of *Hunt v. Hunt* (1), it was held, that where several issues are referred to an arbitrator, it is not indispensably necessary for him to award on each issue, if his intention as to each of them is sufficiently clear from the general language of the award. That was the decision of Mr. Justice PATTESON. Then, as *to the objection, that the arbitrator has given unsatisfactory reasons for the decision which he has pronounced.

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(COLERIDGE, J. : Suppose he states his reasons, which are insufficient, the parties have made him their Judge.)

No power was reserved to the arbitrator to raise any question for the opinion of the Court, nor had he raised any. He had merely stated his reasons, which he considered to be the result of the evidence, and was not the evidence itself. If he had stated the evidence and drawn his conclusion from it, unless his conclusion was manifestly wrong, there being no evidence whatever to justify the opinion he had formed, the Court would not interfere with the award. In *Barrett v. Wilson* (2), the Court refused to set aside an award, on the ground that the arbitrator had come to a wrong conclusion on the facts, there being some evidence to support his finding, though the Court did not think the arbitrator right in his conclusion from the evidence. For these reasons, the award must be considered as sufficiently certain.

Wightman, in support of the rule, contended, that the award was too uncertain to be sustained. It did not appear, on the face of it, that the plaintiff's right of action had been *prima facie* proved so as to require the plaintiff to go into proof in support of his plea. Then, the arbitrator having stated his reasons on the face of his award, the Court was at liberty to look at them, in order to determine on their sufficiency. * * *

COLERIDGE, J. :

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I have no right to set aside the award, because I may not be satisfied that the decision is quite correct. It is possible, from what appears on the face of the award, that the decision of the arbitrator may not be satisfactory. But what is here stated is not set forth

(1) 49 R. R. 717 (5 Dowl. P. C. 442). (2) 3 Dowl. P. C. 220; S. C. 1 Cr. M. & R. p. 586.

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as the full evidence in the cause, but the mere impression of the evidence which the arbitrator has received. It may be, however, that as to the merits, it is a satisfactory determination. I agree with the observation of Mr. Justice PATTERSON, that there is no necessity for a finding in express terms on the matters referred to the arbitrator; for, sometimes there are references to laymen, and their awards cannot be expected to be drawn up in a strict clerical manner. It is enough if we see that the matter has come before the arbitrator, and been adjudicated upon. From the length of time which the premises in question had been occupied by the plaintiff, and the manner in which, and the persons by whom, it was occupied, the arbitrator might see that the trespass had been proved. It is quite consistent, therefore, for the arbitrator to say that the defendant had not produced any evidence in support of his plea, and, therefore, that the plaintiff was entitled to a decision in his favour. The defendant was bound to prove his plea, if the plaintiff proved the trespass. I think, therefore, that I must consider that an adjudication has been made by the arbitrator, and, therefore, the present rule must be discharged.

Rule discharged.

1841.

ROSS v. CLIFTON (1).

[356]

(9 Dowling, Pr. Cas. 356—359; S. C. 5 Jur. 268.)

Where an arbitrator awards damages for an injury caused by the defendant to the plaintiff's property, by acts done in the adjacent property of the former, and then having power to direct the mode of enjoying the property for the future, he awards that the parties shall respectively enjoy it as heretofore, the award is not final, and, therefore, bad.

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WARREN showed cause against a rule *nisi*, obtained by *Shee*, Serjt., for setting aside an award on certain grounds specified in the rule. The objections stated in the rule were, "That the said award is inconsistent, and contains no final decision on the matters submitted to the arbitrator, nor any directions as to the future enjoyment of the property." It was an action on the case, and the cause, as well as all matters in difference, were referred to a legal arbitrator, to determine *both the cause and the matters in difference; and it was further ordered, "That the arbitrator should have power to direct how the property in dispute should be enjoyed for the future." The arbitrator assumed the burthen of the reference, and in addition to the matters litigated in the cause, three claims

(1) *Grenfell v. Edgcombe* (1845) 7 Q. B. 661.

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to damages were made in respect of the alleged obstruction of a flue, the diversion of a water-spout, and the building over a water-course. The arbitrator, by his award, directed that the defendant should pay to the plaintiff damages to the amount of 80*l.* in respect of the last mentioned grounds of complaint. He then proceeded to direct, "that the parties shall continue to enjoy the property respectively as heretofore." To this award, the objections stated in the rule were made. Those objections must be considered as ranging under three heads; first, that the award is inconsistent; secondly, that it contains no final decision; thirdly, that there was no direction as to the future enjoyment of the property. A preliminary objection might be taken to this mode of stating the grounds of objection, which was, that it was far too vague. The grounds ought to be so specific as clearly to point out the particulars wherein the objections stated thus generally could be found. In *Allenby v. Proudlock* (1), the Court held, that it was too general to state a ground of objection, "That the arbitrator made his award under misapprehension of the terms of reference." In *Gray v. Leaf* (2) it was decided, that it was insufficient to state the grounds of objection, "that the award is not final, that the arbitrator had exceeded his authority, that the award is uncertain, or that the arbitrator has not awarded on all the matters referred to him." Again, in *Boodle v. Davies* (3), the same principle was recognized. This objection applied to all the grounds. But if any doubt existed as to the third ground, it must be perfectly clear that the arbitrator had not committed the fault suggested by that ground. The objection was, that the arbitrator had given no directions as to the future enjoyment of the property. It was, however, *perfectly clear that he had given some directions. They might not be such directions as the defendant thought desirable, but that constituted no ground of objection. That was a matter peculiarly within the jurisdiction of the arbitrator, he being judge both of law and fact. In *Snook v. Hellyer* (4), the Court held, that an award directing money to be paid to a stranger for the use of one of the parties to the submission, was sufficient (5). For these reasons, it was submitted, that the

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(1) 4 Dowl. P. C. 54.

(2) 8 Dowl. P. C. 654.

(3) 42 B. R. 367 (3 Ad. & El. 200; 4 Nev. & Man. 788).

(4) 23 B. R. 741 (2 Chit. 43).

(5) See *In re Mackay*, 41 B. R. 456 (2 Ad. & El. 357); and *In re Skeete*, 7

Dowl. P. C. 618, where the Court refused an application for an attachment at the instance of a stranger, to whom an award had directed that a certain sum should be paid by one of the parties to the submission.

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grounds suggested for setting aside the award were insufficient, and, therefore, the rule for setting it aside must be discharged.

Shee, Serjt., in support of the rule, admitted that if the grounds of applying to set aside the award were as general as stated by the other side, they could not be supported; but they ought not, nor were they intended to be, divided in the manner suggested, into three heads. The whole objections to the award were, that it was inconsistent and not final. * * *

Cur. adv. vult.

[359] WILLIAMS, J.:

This was an application to set aside an award, on the ground that it was not final, and did not adjust the matters in difference between the parties. It appears, that the cause and all matters in difference were referred to an arbitrator, and, among other things, power was given to him to regulate the enjoyment of the property, which, it appears, constituted a matter in difference independent of the cause. But this matter in difference was made a subject of litigation before the arbitrator. One part of the claim for damages was made by the plaintiff, in respect of the obstruction of a flue; another, for having diverted a water-spout; a third, for building over a watercourse. The arbitrator having disposed of the cause, awarded damages to the extent of 80*l.*, in respect of the claims last mentioned; he then proceeded to award that the parties respectively should enjoy the property as before. Now, as the arbitrator found that the property of the plaintiff had been injured, and that the then state of the property was pregnant, to a certain degree, with injury, as appeared by his awarding 80*l.* damages in respect of that injury, to direct the same state of things to continue was leaving the property in a state of dispute, instead of preventing future disputes, which was the peculiar object of the reference. It is impossible to say, that this was such a final adjustment of the property as was intended by the parties to the reference. It seems to me, therefore, that the award cannot be allowed to stand, and the present rule must, consequently, be made absolute.

Rule absolute.

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(9 Dowling, Pr. Cas. 359—361; S. C. 10 L. J. Q. B. 129; 5 Jur. 366.)

The Court will not compel a relator in a *mandamus*, to give security for costs, he being interested in the matter in question, on the ground of his poverty, or that other persons have induced him to apply for the writ.

PETERSDORFF showed cause against a rule *nisi*, obtained by *Barstow*, calling on the relator, in certain proceedings in *mandamus*, to show cause why those proceedings *should not be stayed, until security for costs had been given. The rule for a *mandamus* had been made absolute. The ground of the application was the poverty of the relator, and that certain persons had induced him to apply for the *mandamus*. The former, it was submitted, was no reason for compelling the relator to give the security required. The only cases where the poverty of the plaintiff was allowed to operate so as to induce the Court to interfere in the manner required by this application, were those in which the plaintiff, being a pauper, acted vexatiously, or allowed himself to be made the instrument of others. But in those cases the poverty of itself was not allowed to be a ground for compelling a plaintiff to give security for costs. Applications of this kind had been allowed in proceeding by *quo warranto*, on the ground of the defendant's poverty, and his acting merely as the instrument of other parties. But even there, if no fraud was suggested, and the relator was a corporator, the Court would not compel him to find security for costs. In *Rex v. Wynne* (1), the Court refused to stay proceedings in a *quo warranto* information, until the prosecutor gave security for costs, on the ground that he was in insolvent circumstances, it appearing that he was a corporator, and no fraud being suggested. Then, as to his being induced by others to apply for the writ, that was no ground for this application. He had a right to enforce his rights, and was, therefore, entitled to proceed. But no instance of proceeding by *mandamus* could be adduced in which the Court had interfered in the manner required. The case of *mandamus* was clearly distinguishable from that of *quo warranto*. In the former the party proceeded to enforce his own rights, but in the latter he might be proceeding for the benefit of others. Under these circumstances, it was submitted, that the present rule ought to be discharged.

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(1) 15 B. B. 273 (2 M. & S. 346).

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Barstow, in support of the rule, contended, that an application *in proceedings by *mandamus*, was clearly within the principle of proceedings by *quo warranto*. The Court had, on a variety of occasions, interfered, by granting such applications as the present, in proceedings by *quo warranto*, and, therefore, by analogy, the present application ought to succeed.

WILLIAMS, J. :

One thing is perfectly clear, that if this individual has a right, there is no reason, on the ground of his poverty, merely for compelling him to find security for costs. Then comes the question, whether the Court has before interfered in cases of *mandamus*? It appears to me that it has not, and I am afraid of originating a practice in such a case. I remember, in the case of *Dr. Free*, an application was made by him *in formâ pauperis*, to sue out a writ of *mandamus* to St. John's College, Oxford. The application was allowed in that form. It seems to me, that whoever in this case may have induced the relator to proceed, as it is not sworn that he had no interest to try in the matter, and the granting the *mandamus* would seem to show that he had such an interest, and it is further apparent, that his being poor cannot prevent his prosecuting the writ, I do not think, that in the absence of any such practice being shown to exist, that I ought to originate such a one. The present rule must, therefore, be discharged; but without costs.

Rule discharged, without costs (1).

1841.

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IN THE MATTER OF ARBITRATION BETWEEN WOODCROFT AND JONES.

(9 Dowling, Pr. Cas. 538—543; S. C. 5 Jur. 771.)

A clause in a partnership deed, authorizing a reference in case of disputes between the partners, and the making the "award" of the arbitrator, instead of the "submission" a rule of Court, if it does not appear that "award" was used by mistake for "submission," is not within the meaning of the 8 & 9 Will. III. c. 15, s. 1 (2), and, therefore, a Judge has no power to order witnesses to attend an arbitrator acting in such a matter.

Where there did not appear to have been any misconduct on the part of the parties or arbitrators, the Court refused to direct a submission to arbitration to be revoked.

KELLY showed cause against a rule *nisi*, obtained by *Sir William Follett*, calling on *Woodcroft* to show cause why leave should not

(1) See *Rex v. Day*, 1 Dowl. P. C. 32. (2) Repealed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49).

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be given to revoke the submission to arbitration, if any had been made, and why the order of Mr. Justice COLERIDGE, requiring the attendance of certain witnesses, should not be set aside. It appeared that Messrs. Woodcroft and Jones had, by deed dated 15th of May, 1834, entered into partnership for a period of seven years, to be computed from the 31st of July, 1840. The deed contained a clause, "That if any doubt, difference, cause of suit, or dispute should arise at any time or times thereafter between the said parties, their executors or administrators, or any of them, touching the consideration of these presents, or any clause, matter, or thing herein contained, or the said copartnership, trade, or business (and such doubt, or difference, or dispute should not be fully decided between themselves within fourteen days after the same should arise), then that, on the request of either, it should be reduced to writing, and referred to arbitration." Clauses were then introduced for appointing an arbitrator, and also a provision made, "That for the further and better enforcing of every such award, the same shall from time to time be made a rule of the Court of King's Bench according to the direction of the statute in that case made and provided." The partnership terminated at the end of July, 1840. On proceeding to settle their affairs, it was found that certain disputes arose concerning *the partnership accounts, and Woodcroft accordingly had them reduced into writing, and on the 5th of August, sent them to Jones, requiring his consent to their being submitted to arbitration pursuant to the deed. This he refused, and would not take any step in the matter towards the final adjustment of the dispute. At the instance of Woodcroft, however, arbitrators were appointed to determine the disputes, and they made a peremptory appointment for the 29th of October to proceed with the reference. An order was obtained by Woodcroft from Mr. Justice COLERIDGE, requiring the attendance of certain witnesses before the arbitrators. On the 15th of August, 1840, Jones filed a bill for an account in the Court of Chancery, and for the final settlement of the partnership affairs. On the 17th, Woodcroft was served with a *subpœna* to appear to the bill. Proceedings were still pending, and a receiver appointed. On this state of facts, the present application was made for leave to revoke the submission to the arbitrators, and to rescind Mr. Justice COLERIDGE's order for the attendance of the witnesses before the arbitrator. *Kelly* now contended, that with respect to the first branch of the rule, there was no ground for revoking the

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submission to arbitration. With respect to the second branch of the rule, there was as little ground for granting it, as, the order of Mr. Justice COLERIDGE was perfectly legal and regular. Although the word in the deed describing the instrument to be made a rule of this Court was "award," and not "submission;" it was perfectly clear that the intention of the parties was that the "submission" should be made a rule of Court. * * *

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Sir William Follett supported the rule, and contended, on the first part of the rule, that as there were now grounds pending with respect to these very matters in dispute before a court of equity, it would be exceedingly inconvenient that two litigations should be proceeding at the same time on the same subject. As to the second part of the rule, the deed of partnership only authorizing an "award" to be made a rule of Court, the case did not come within the meaning of the 8 & 9 Will. III. c. 15, s. 1, which only applied to "submissions." * * *

Cur. adv. vult.

COLERIDGE, J. :

[*541]

This was a rule for leave to revoke the submission to arbitration, if any such had been made, and for the rescinding an order made by me for the attendance *of certain witnesses before the arbitrators. The rule was moved in this form, because it was contended, that there had been no submission within the 8 & 9 Will. III. c. 15. It is necessary, however, in considering the first part of the application to treat the submission as made within that statute, because, unless it is, it seems clear that it is not within the 8 & 4 Will. IV. c. 42, s. 39, and if so, there would be no necessity for any permission to revoke. Making this assumption, and looking only to the facts of the case, I can see no reason for allowing the revocation. It is not averred, that the opposite party has in any way misconducted himself in any matter connected with the reference, or that he has not correctly pursued the provisions of the deed which contains the covenant to refer, nor is it alleged, that according to those provisions, the arbitrators have not been duly appointed, or in any way behaved amiss. Inconveniences indeed are stated, and that the applicant has filed his bill in equity concurrently with his opponent's proceeding on the clause of reference in the partnership deed. But assuming that clause to be valid, I cannot but see that the inconveniences alleged are attributable to the applicant's own

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wrongful breach of it, and I must not deprive the other party of the benefit of that clause on account of inconveniences so produced, or because the applicant has chosen to file a bill instead of abiding by it. This part of the rule, therefore, might thus be disposed of. If there is no submission, leave to revoke will be nugatory; if there is, the leave ought not to be given. But in order to determine on the latter part of the rule, it is necessary to decide whether there is a valid submission on the two statutes. Because the order for the attendance of witnesses ought not to have been made, unless the case is within them. And although it does not appear clearly that any of the witnesses made the present application, it is not fitting to leave it in uncertainty whether the order ought to be obeyed by them or not. The question arises under the following circumstances, Jones and Woodcroft *enter into partnership by deed, for a term which expired by effluxion of time on the 31st of July, 1840. The deed contains a clause of reference in these words, "If any doubt, difference, cause of suit, or dispute should arise at any time or times thereafter between them, their executors, &c., touching the construction of these presents, or any clause, matter, or thing therein contained, or the said copartnership trade, or business." The deed then goes on to prescribe the course to be pursued in the statement of matters of difference, the appointment of arbitrators, and other matters down to the making of the award, and then proceeds thus, "And for the further and better enforcing the observance of every such award, the same shall from time to time be made a rule of the Court of King's Bench, according to the direction of the statute in that case made and provided." It was contended, that the statutes only applied to agreements containing a stipulation that the submission should be made a rule of Court, and although it was not disputed that an agreement to make the award a rule of Court instead of the submission, had been held to warrant the interposition of the Court; those, it was said, were cases in which the Court had seen that the word "award" had been used by mistake for "submission," and that the parties had intended to make the "submission" a rule of Court. But that in this case, the parties had really intended only what they had expressed, namely, to make the award a rule of Court, that this was shown by the language of the deed speaking of "every such award" being "from time to time" made a rule of Court. It certainly appears, that the parties contemplated the possibility of several differences and several arbitrations occurring in the course

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of the partnership. The framer of the deed probably thought that awards might be made rules of Court, but it is difficult to suppose that there could have been an intention of making the whole deed a rule of Court, which, as it embraces many objects, there might be frequent need of, and which, even with reference to the arbitration clause, *the parties must be taken to have thought that they might, on more than one occasion, require to be possessed of. But if there was no intention to make the submission a rule of Court, and the words of the clause are to be understood literally, it appears to me, that the statute of Will. III. does not extend to it. The object of that statute was to effectuate the agreement of parties to refer, by giving them the authority of the Court. If then the agreement becomes the rule of Court, the authority of the Court cannot be pledged to enforce anything which the parties have not previously agreed to. The award must be tried by the rule. and unless it squares with it, obedience cannot be summarily enforced. But if the award becomes the rule of the Court, the Court may be called on to enforce something which the previous agreement of the parties has not sanctioned. The statute enacts, that the rule of Court shall be made simply upon reading and filing an affidavit of the witnesses to the agreement; and this is quite proper where that is made the rule, about which there can be no dispute, and which is to give the limit to the proceedings of the arbitrator, but which can never be itself brought into question. If, however, the award is to be made the rule of Court, that could not properly be done until its accordance with the submission had first been established. It could not, therefore, be done *ex parte*, upon this ground, and without entering upon other considerations, I think this case not within the statutes, and that the order for the attendance of witnesses ought to be rescinded; to this extent the rule will be absolute.

Rule accordingly.

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1841.

(9 Dowling, Pr. Cas. 550—553; S. C. 5 Jur. 749.)

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In order to justify an arbitrator proceeding *ex parte*, a very strong case must be shown of wilful delay by the party not attending; and, therefore, if a reasonable excuse for his not attending is shown, the Court will set aside an award made pursuant to such a proceeding.

The Court will not, on disposing of a rule for setting aside an award on that ground, decide the question whether the party, against whom the award is made, shall pay the costs arising from his delay; but a separate motion for that purpose must be made.

GURNEY showed cause against a rule *nisi*, obtained by O'Malley, calling on the plaintiff to show cause why the award, made in this case in favour of the plaintiff, should not be set aside on the ground, among others, that the arbitrator had proceeded *ex parte* in the absence of the defendant. It was an action against an attorney for negligence, and a verdict was taken in favour of the plaintiff, subject to a reference. A notice of a meeting was given to the defendant for the 9th of July. He did not, however, attend. He afterwards stated that the counsel whom he had engaged, was absent from town, and, consequently, could not attend. It was sworn, however, in answer to this statement, that inquiries had been made at the Chambers of the counsel in question, and he stated that he had not been spoken to on the subject. Nothing was done at this meeting. On the 8th of August, notice was given by the arbitrator to the defendant of a meeting to be held on the 12th, and that notice was marked "peremptory." When this notice was served on the defendant, he stated to the person serving it, that he should not attend, but gave no reason to that person why he should not attend. He sent a letter, however, to the arbitrator, stating his reasons. Among those reasons was, first, the shortness of the notice, and, secondly, that he did not wish to proceed with the matter during the long vacation. He accordingly did not attend the meeting, and the arbitrator did nothing. A notice was then given by the arbitrator, on the 13th of August, for the 14th of September. That notice was not marked peremptory, nor did it state that the arbitrator would proceed in the absence of the defendant, if he did not attend. The plaintiff's attorney, however, at the time of serving the notice of this meeting, stated to the defendant that he should require the arbitrator to proceed *ex parte*, if the defendant did not attend. At that meeting, on the 14th of September, the defendant *did not attend, and no reason was assigned for his neglect. The arbitrator then proceeded *ex parte*, and heard the plaintiff's evidence. No

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subsequent meeting took place, and on the 26th of September, the arbitrator made his award. During the whole period, from the time of the trial to the last meeting, the defendant was frequently requested to mention some day when it would be convenient for him to attend, but he always avoided naming any day. Gurney contended, that the only question for the consideration of the Court was, whether the facts disclosed in these affidavits, justified the arbitrator in proceeding *ex parte*? He submitted that they did. The reason assigned by the defendant for not attending the first meeting, was false; for not attending the second, was insufficient; and none at all was stated for not attending the third. Under these circumstances, the arbitrator must be considered as clearly justified in so proceeding. No ground, therefore, existed for setting aside the award so made.

O'Malley supported the rule :

No doubt, under certain special circumstances, an arbitrator might proceed with a reference *ex parte*, but those which existed in the present case, were not of that description. The notice for the last meeting was not marked peremptory, nor did it intimate to the defendant that the arbitrator would proceed *ex parte*, if he did not attend. The notice for the previous meeting had been so marked, which had the effect of deceiving the defendant. The case of *Dodington v. Hudson* (1) showed that such a notice as the one given for the last meeting, was insufficient, and, therefore, the award made under such circumstances could not be sustained.

COLERIDGE, J. :

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This case is put chiefly on the ground, that the arbitrator has proceeded with the reference *ex parte*, and without the defendant having notice that he *should so proceed. I should be sorry to lay down a rule, that in no case may an arbitrator proceed *ex parte*, and in the absence of one of the parties; for undoubtedly it would be his duty in many cases so to do, but then it ought to be a very strong case to warrant him in so proceeding. Now, on consideration, I think that in this case the arbitrator has proceeded a little too hastily. It appears that three different appointments for meetings were made, but it does not appear, as to any one of them, that it was made with reference to anything that had passed with the defendant, whereby he had agreed to fix either of the days, and

that he afterwards, notwithstanding, absented himself. As to his excuse for absenting himself from the first, it is said that the defendant has made a representation which turns out not to be true, which is, that his counsel was out of town, and that on application at the Chambers of the counsel named, it appears that he had not been applied to. I do not think that to be very contradictory, for the defendant might have known that the counsel was out of town, and that, therefore, he had not applied to him, though he intended to do so on his return. It being stated that he had actually engaged this counsel raises a suspicion perhaps; but then, these facts appear on the last affidavits which have been sworn, and there is no opportunity for the defendant to give any explanation of them. The arbitrator, it appears, did not proceed with the reference at that first meeting, and then a notice was given to the defendant, which was a “peremptory” notice. The defendant, it appears, said immediately to the party, that he should not attend the meeting, and gave no reasons for not doing so; but he sent a very respectful letter to the arbitrator, giving good reasons for his refusal, one of which was an objection to the shortness of the notice, and another, an objection to the matter proceeding during the long vacation. The defendant declined attending the meeting for those reasons, and the arbitrator again abstained from proceeding with the reference at the second meeting. Another appointment *was then made for a day which was still within the long vacation, and the notice for it was not a “peremptory” notice, nor did it state that the arbitrator would proceed *ex parte*, if the defendant did not attend. A notice was also given by the attorney at the same time for one, but that did not state that he should apply to the arbitrator to proceed *ex parte*, in case the defendant did not attend. At the day of meeting, however, the arbitrator did proceed *ex parte* in the absence of the defendant. Now, I really think that it is so substantial an inconvenience, and so much prevents the doing justice between the parties, that a reference should proceed *ex parte* in the absence of one of the parties, that it must be a very strong case to justify an arbitrator so proceeding; and I think that such a strong case is not made out on these affidavits, and, therefore, this rule must be made absolute.

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Gurney then asked to have it made part of the rule, that the defendant should pay costs to the other party, under the usual clause in the order of reference, that if either party was guilty of wilful delay, he should pay such costs as the Court should direct.

GLADWIN COLERIDGE, J. :

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That must be the subject of a separate motion, so as to give the defendant an opportunity of answering the statement made against him.

Rule absolute.

1841.

CHAMBERS v. COLEMAN.

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(9 Dowling, Pr. Cas. 588—595.)

It is a sufficient return of a sheriff to a writ of *fi. fa.*, that he has seized goods of the defendant by virtue of several previous writs of *fi. fa.*, "according to their priority."

The sheriff must state some amount as the value of the goods seized, but the omission to do so is only an irregularity, and therefore, where a return so far defective was made on the 6th of March, it was held too late on the 24th of April following, to object to the return on that ground.

THESIGER showed cause against a rule *nisi*, obtained by *Kelly*, for setting aside the return of the sheriff of Hertfordshire to a writ of *fi. facias*. As a preliminary objection, it was contended, that the application was too late. The return to the writ was made on the 6th of March, and the application to set it aside was not made until the 24th of April, seven weeks afterwards. It was perfectly competent for the plaintiff to apply to a Judge at Chambers during that interval, or during the nine first days of Term. Such *laches* disentitled the plaintiff to make the present application.

Kelly, in support of the rule, contended, that the return which the sheriff had made in the present case, was not merely an irregular one, but was a nullity. The supposed *laches*, therefore, suggested, did not waive the objection. * * *

COLERIDGE, J. :

You had better proceed to the merits. I will consider that objection.

Thesiger :

The return to the writ was in this form: "I, Robert William Gaussen, Esq., sheriff of the county of Hertford, do hereby certify to our lady the Queen, that on the 9th day of February, 1841, before the coming to me of the writ of *fi. facias* hereto annexed, a certain writ of *fi. facias* against the goods and chattels of Thomas Coleman, in the writ hereto annexed mentioned, issuing *out of the Court of our lady the Queen, before the Queen herself, was delivered

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to me, at the suit of Samuel Sharp, indorsed, to levy 254*l.* 5*s.* And that on the 18th day of February, 1841, and before the delivery of the said writ hereto annexed to me, a certain other writ of *feri facias*, issuing out of the Court of our lady the Queen, before the Barons of her Exchequer at Westminster, against the goods and chattels of the said Thomas Coleman, was delivered to me, at the suit of John Gibbons, indorsed, to levy 100*l.* 18*s.* 6*d.* And that on the 19th day of February, 1841, and before the delivery of the said writ hereto annexed to me, a certain other writ of *feri facias*, issuing out of the Court of our lady the Queen, before the Queen herself, against the goods and chattels of the said Thomas Coleman in the writ hereto annexed mentioned, was delivered to me, at the suit of William Cooper, indorsed, to levy 86*l.* And that on the 23rd day of February, 1841, before the coming of the said writ hereto annexed to me, a certain other writ of *feri facias*, issuing out of the Court of our lady the Queen, before the Queen herself, against the goods and chattels of the said Thomas Coleman, was delivered to me, at the suit of Charles Dod the elder, indorsed, to levy 226*l.* 2*s.* 8*d.* And that on the 24th day of February, 1841, and before the delivery of the said writ hereto annexed to me, a certain other writ of *feri facias*, issuing out of the Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, against the goods and chattels of the said Thomas Coleman in the writ hereto annexed mentioned, was delivered to me, at the suit of John Samuel Story, indorsed, to levy 29*l.* 2*s.* And that on the same 24th day of February, 1841, and before the delivery of the said writ hereto annexed to me, a certain other writ of *feri facias*, issuing out of the Court of our lady the Queen, before the Barons of her Exchequer at Westminster, against the goods and chattels of the said Thomas Coleman in the writ hereto annexed mentioned, was delivered to me, at the suit of James Thomas, indorsed, *to levy 276*l.* 19*s.* And that on the 25th day of February, 1841, the said writ hereto annexed, was delivered to me. And I further certify, that by virtue of the said several writs, and according to the priority thereof, I have seized certain goods and chattels of the said Thomas Coleman in my bailiwick, the value whereof is to me unknown, and which remain in my hands unsold for want of buyers. Wherefore I cannot have the within mentioned damages, or any part thereof, before our lady the Queen as I am within commanded. And I further certify to our lady the Queen, that a *fiat* in bankruptcy, dated on the 26th day of February, 1841, hath been awarded and issued against the

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said Thomas-Coleman." One objection to the return was, that the sheriff had stated a seizure under more writs than one, instead of stating the seizure to have been made under each particular one according to its priority. This objection was founded on the authority of the case of *Wintle v. Lord Chetwynd* (1). * * The rule [there] laid down by Mr. Justice PATTESON might be admitted as the correct one, but it did not apply to the present case, as here the seizure was stated to have been made under the writs set forth in the return *according to their priority. It could not be said, therefore, that the sheriff had returned a seizure under more writs than one in the manner to which Mr. Justice PATTESON's remarks referred. The second ground of objection was, that the sheriff had not stated any value of the goods which he returned that he had seized. It was almost impossible for a sheriff, under such circumstances as those which were here disclosed, to state even an approximation to the value of the goods seized. The Court would not, therefore, require him to do that which was, in fact, impossible.

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Kelly, in support of the rule, contended on the first point, that within the spirit of the case of *Wintle v. Lord Chetwynd*, the return must be considered as insufficient. * * *

Cur. adv. vult.

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COLERIDGE, J.:

This was a motion to quash the return made by the sheriff of Hertfordshire to a writ of *fiery facias*, on two grounds. The first, that having recited in order a number of writs previously delivered against the same defendant, he had returned a seizure of the defendant's goods and chattels under all of them; the second, that the goods remaining unsold for want of buyers he had returned, that the value of the goods was unknown to him, instead of stating some value, or that they were of the value of the debts or damages to be levied. A preliminary objection to the motion was made on the ground of its lateness; the return being made on the 6th of March, and the plaintiff not having applied to quash it till the 24th of April; and as the term commenced on the 15th of April, *I should certainly hold that the application was made too late, without considering whether it ought not to have been made to a Judge at Chambers in the vacation, if the defects relied on amount only to irregularities. *Mr. Kelly*, for the plaintiff, accordingly contended that they made the return a nullity, and could not be waived. It is necessary, therefore, to consider the nature of these

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two defects, and in support of the motion as to both, the case of *Wintle v. Lord Chetwynd* (1) was relied on. The return, there, appears to have been in these words—"By virtue of this writ, and of another writ of *feri facias* to me delivered, prior to the receipt of this writ, I have seized, and taken in execution, goods and chattels of the within named defendant, which remain in my hands unsold for want of buyers; value uncertain." PATTESON, J. is reported to have said—"the sheriff cannot return that he has seized goods by virtue of two writs. He cannot do that. It is impossible that he can seize under two, as one of them must have a priority. He ought to state expressly that he has or has not seized goods under the writ." Before I make any observation on these words, I should state that the return, which the Court has now before it, varies from that in the case cited; each prior writ is stated in order, and it details the dates of delivery, the amount to be levied, the names of the plaintiff in each action; and then, after stating the delivery of the writ in question, the sheriff returns, that "by virtue of the said several writs, and according to the priority thereof, I have seized," &c. The sheriff, therefore, in this case has expressly stated a seizure of goods under each and all of the writs, and has added that he has made such seizures according to the priority of the several writs. Now, where a sheriff is in possession of goods under a *feri facias*, the legal effect of the delivery to him of a second writ is, that the goods are bound by it from the day of delivery, subject to the first, and that without warrant or *further actual seizure; and supposing the value of the goods be only equal to cover the amount to be levied under the first writ, yet if that writ be set aside, a return of *nulla bona* to the second would be a false return. Whether it is strictly correct to call such legal effect a seizure, is, perhaps, not material to determine in the present case, because, at all events, it is but an error in language, which would not make the return a nullity. But I may say, in passing, that it seems difficult to find a better term for it. The sheriff means to say, that, by law, he is in possession of the goods under the second writ as well as under the first; and how does he acquire possession but by seizure actual, or in legal contemplation? Suppose a single chattel seized, of the value of 100*l.*, under a writ endorsed to levy 30*l.*, and then a second and third writ to come, each endorsed to levy 30*l.* more, why may not the sheriff be reasonably said to seize the chattel under the later writs,

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according to their priority in respect of the value beyond that to be levied under the first? I have thought it right to confer with my brother PATTESON upon this matter, and he authorizes me to say, that he thinks the language attributed to him in *Wintle v. Lord Chetwynd*, somewhat too strong and unqualified; as he took occasion to say when it was cited last Term in the full Court. It remains to consider the second objection, and I conceive it to be clear that the sheriff ought, in all cases to return some value to the goods seized. The case cited is an authority for the necessity of his doing so where there are more writs than one; but the reason applies universally. He will not be strictly bound by the value he returns, but he should form the best estimate he can, and thereby afford the plaintiff the information he has a right to have, in order to determine his future proceedings. Still the question remains, whether the neglect to do this makes the whole return a nullity? It is by no means easy to lay down any one rule, whereby to distinguish between an irregularity, and that which makes a proceeding a nullity. Mr. Tidd defines an irregularity to be, "the want of adherence to some prescribed rule or mode of proceeding." *And he says, "it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time, or improper manner" (1). A defect is supposed, but one that does not take away the foundation or authority for the proceeding, or apply to its whole operation. The present case appears to me to fall within this line; the return contains all essentials, but it does not give the plaintiff that full information as to one point which it ought; and if he had applied in time, he might have set it aside for that reason, and procured a better; but, as it is, it cannot be said to be no return. The rule, therefore, must be discharged, and being moved on the ground of an irregularity, with costs.

Rule discharged with costs.

(1) P. 512, 9th edit.

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WARD *v.* HALL.

(9 Dowling, Pr. Cas. 610—612; S. C. 5 Jur. 800.)

1841.

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An arbitrator, to whom a cause, in which several issues were joined, was referred, the costs to abide the event, disposed of each issue, and then, although no power for that purpose was given to him, awarded a *stet processus*: Held, that although this was an excess of authority, the award was only bad as to that part, and good as to the rest, and that the parties might proceed to tax their costs on it.

MELLOR moved for a rule, to show cause why an award should not be set aside, on the ground that the arbitrator had exceeded his authority. It was an action of detinue, for detaining a variety of deeds relating to different estates. The defendant was an attorney, and pleaded, first, *non detinet*; secondly, that the plaintiff was not possessed of the deeds in question; thirdly, a lien on the deeds, as an attorney; fourthly, as to certain of the deeds relating to the Belton estate, a deposit of them as a security for advances made beyond the amount of 1,500*l.* to the plaintiff; fifthly, as to another part of the deeds, a deposit of them as a security for the purchase-money of a certain estate; sixthly, leave and license. A variety of issues were taken on these pleas. When the cause came on for trial, it was referred, on the usual terms, that the costs of the cause should abide *the event, the costs of the reference and the award to be in the discretion of the arbitrator. The arbitrator having entered on the reference found on all the issues, and then proceeded to award a *stet processus*, by directing, “that no further proceedings shall be taken in the said action.” No such power was vested in him by the order of reference, and, therefore, he had exceeded his authority. This direction was inconsistent with the terms of the order of reference, as it was provided by them, that the costs of the reference and award should abide “the event,” but a *stet processus* was no event, at least no legal event; but as long as this award existed, the Master could not proceed to tax the costs of the arbitration and award. It could not be said, that merely awarding on the issues amounted to an “event,” for some of them were decided in favour of the plaintiff, and some in favour of the defendant: *Duckworth v. Harrison* (1), *In the matter of Leeming and Fearnley* (2).

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COLERIDGE, J. :

It seems to me that I ought not to grant this rule. The motion is made to set aside the award, on the ground that the arbitrator

(1) 7 Dowl. P. C. 71.

(2) 39 R. R. 516 (5 B. & Ad. 403).

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has exceeded his authority. It seems that the cause was referred to him, and the costs of the cause were to abide the event, and the costs of the arbitration and the award were to be in his discretion. It was an action of detinue. There were several pleas, and he has found on the issue raised on every one. That is an event to the cause. It would have been an excess of authority, if he had gone on to give it a more legal form of event. The costs being to abide the event, there is no foundation for the suggestion, that there is a difficulty in taxing the costs. It is not objected that he has not found on each particular issue, and, therefore, the duty of the Master will be perfectly easy to proceed to the decision as to the costs. But then it is said, that the arbitrator has exceeded his authority, by saying that there shall be no further proceedings. [*612] *By so saying he certainly did so far exceed his authority. But this is an instance, in which the excess of authority may be separated, and the rest of the award left to take effect. It seems to me that this is only an objection *pro tanto*, and which may be separated from the other part of the award. In my opinion, therefore, both parties are at liberty to proceed to taxation before the Master.

Rule refused.

1841.

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DOE D. TURNER *v.* GEE.

(9 Dowling, Pr. Cas. 612—614.)

Where a party is served as tenant in possession, and he swears that he is under-lessee of the premises sought to be recovered, the Court will not set aside an appearance entered by him on a suggestion by the lessor of the plaintiff, that the tenant has no interest in the premises.

BAYLEY showed cause against a rule *nisi*, obtained by *Whateley*, calling on Gee, the defendant, to show cause why the appearance entered by him should not be set aside, unless two persons, named Clarke and Burdon, would come in and defend the action. It appeared from the affidavits, that it had been agreed between the lessor of the plaintiff and a person named Clarke, that the latter should become the lessee of two houses belonging to the former, after certain repairs had been done; that the lease should contain covenants to repair, to insure, and not to underlet. There was also to be a clause of re-entry, in case of a breach of any of the covenants. It was agreed that the intended lessee should hold, on the terms of the lease, until that instrument could be executed. The repairs covenanted for not being done, the present action of ejectment was brought, on the clause of re-entry, to recover possession of the two

houses. The declaration was served on Gee, who was tenant of one of the houses, and afterwards on him as for Clarke. Gee accordingly entered into the consent rule and appeared. No service, however, was effected on Clarke in any other way. It was sworn, in support of the application, that Gee had no interest in the premises, and therefore, that he had no right to appear and defend the action. In answer to the application *it was sworn, that Clarke had underlet one of the houses to Haddon, who underlet it to Burdon, who again underlet it to Gee; and Gee now swore that the premises were thus underlet to him, and that he was tenant in possession. With respect to the other house, he laid no claim to defend as to that. Turner, the lessor of the plaintiff, having served Gee as tenant in possession, and the latter swearing that he took an interest in the premises, it was perfectly regular for him to enter an appearance and defend the action. It was not competent for the Court to try, on affidavits, the merits of the respective claimants to this house. Under these circumstances, the Court would discharge the rule.

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Whateley, in support of the rule, contended that the statements made in the affidavits, in answer to this application, only showed a colourable defence on the part of Gee, and that it was evident he was the mere instrument of Clarke or Burdon. The Court would not, therefore, allow him to continue his appearance and defend the action.

COLERIDGE, J. :

The difficulty I feel is, as to the service of the declaration in ejectment.

Cur. adv. vult.

COLERIDGE, J. :

This was a rule to set aside the appearance of the defendant, with costs, unless two persons, named Clarke and Burdon, would come in and defend the action. The facts of the case were, that Turner had demised to Clarke, by an agreement under seal, some premises, which consisted of two houses. A lease was to be granted after certain repairs were done; and it was to contain certain covenants; namely, to repair, to insure, and not to underlet. There was a clause of re-entry for breach of covenants, and Clarke was to hold the premises, on the terms of the lease, until it was executed. The repairs, it appears, were not done, and this ejectment was brought for breach of covenants *in the agreement. Gee was found in possession of part of the premises, and was served

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with the declaration, as tenant in possession ; but whether as tenant of the whole, or of part only, does not clearly appear, but it would rather seem, of the whole. However, a declaration was afterwards served on him, as for Clarke ; but then, there has been no good service on Clarke. Clarke, it appears, had underlet one of the houses to Haddon. Haddon had underlet it to Burdon, and he again had underlet it to Gee ; and Gee swears, that he now holds as undertenant. Now, as Turner has served him with the declaration as tenant in possession, and he swears that he holds under an assignment, I cannot try the merits of this ejectment on affidavits, and, therefore, I cannot set aside his appearance. But then, it appears on Gee's own affidavit, that he has no claim as to the other house ; therefore, as to that house, the rule may be made absolute, unless Clarke will come in and defend. No costs can be allowed on either side.

Rule absolute accordingly.

1841.

REG. v. TUDDENHAM (1).

[937]

(9 Dowling, Pr. Cas. 937—944 ; S. C. 10 L. J. M. C. 163 ; 5 Jur. 871.)

Proceedings for the recovery of penalties relating to lotteries, contrary to the 42 Geo. III. c. 119, must, since the 46 Geo. III. c. 148, s. 59, be sued for in the name of the *Attorney-General*, and not before magistrates, whether the lotteries are private or State lotteries.

GUNNING moved to discharge the defendant, in this case, out of custody, on the ground of a defect which appeared on the face of the warrant, pursuant to which he was detained in the custody of the gaoler of Norfolk.

The warrant was in the following form :

Norfolk } The Rev. Edward Marsham, clerk, and Thomas Kers-
to wit. } lake, Esq., two of her Majesty's justices of the peace,
acting in and for the said county, to Jeremiah Carmoody, one of
the police officers of the said county, and to Money Curtis, the
keeper of the prison, called the House of Correction, at Little
Walsingham, in the said county.

Whereas Henry Tuddenham, late of the parish of East Rudham, in the said county, licensed hawker, hath been, this 31st day of May, A.D. 1841, duly convicted before us, the above-named justices, at the Petty Sessions, held at the parish of Fakenham, in and for the hundred of Gallow, in the said county, in which said hundred the said parish of East Rudham is situate, for that he, the said

(1) *Taylor v. Smetten* (1883) 11 Q. B. D. 207, 212, 52 L. J. M. C. 101.

Henry Tuddenham, within the space of seven days, now last past, to wit, on the 28th day of May, in the year aforesaid, at the parish of East Rudham aforesaid, in the county aforesaid, did, in a certain room, being part and parcel of certain premises called and known by the name of the "Crown Inn," set up, exercise, maintain, and keep open, in a public manner, *a certain game of lottery, to be determined by the chance of drawing certain tickets, on which tickets certain numbers, in figures, were then and there marked and impressed, and on the drawing of any one of which said tickets the said Henry Tuddenham, then and there undertook, in consideration of a certain sum of money, to wit, the sum of one shilling, to him paid on demand, by the drawer of the same, to deliver certain goods to such drawer of such ticket, contrary to the form of the statute, in such case made and provided; and we, the said justices, did, on the 31st day of May, adjudge that the said Henry Tuddenham should, for his said offence, forfeit the sum of 100*l.*, according to the statute in such case made and provided: And we, the said justices, did also, on the said 31st day of May, adjudge that one-third part of the said forfeiture, should go and be applied to the use of her Majesty, one-third part thereof, to the use of William Steer, of the parish of Fakenham, aforesaid, police officer, who informed us of the said offence, and the other third part thereof, to Samuel Pegler, of the parish of East Rudham, aforesaid, police officer, being the person who apprehended the said Henry Tuddenham, pursuant to the said statute in that case made and provided: And we, the said justices, did also, on the 31st day of May, adjudge, that in default of immediate payment of the said sum of 100*l.*, he, the said Henry Tuddenham, should be imprisoned in the said prison, called the House of Correction, at Little Walsingham, for the space of three calendar months, unless the said sum of 100*l.*, being the forfeiture aforesaid, shall be sooner paid: And whereas the said Henry Tuddenham hath, on this 31st day of May, on demand, made of him, refused to pay the said forfeiture of 100*l.*; Now, therefore, we, the said justices, do hereby command you, the said Jeremiah Carmody, to take the said Henry Tuddenham, and him safely to convey to the said prison, called the House of Correction, at Little Walsingham, and there to deliver to the said Money Curtis, the keeper thereof, together with this precept; and we do hereby command you, the said *Money Curtis, the keeper of the said prison, called the House of Correction, at Little Walsingham, to receive the said Henry Tuddenham into the said prison, called the

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House of Correction, at Little Walsingham, and there to imprison him for the space of three calendar months, unless the said sum of 100*l.*, being the forfeiture aforesaid, shall be sooner paid, and for your so doing, this shall be your sufficient warrant. Given under our hands and seals, at the parish of Fakenham aforesaid, this 31st day of May, 1841.

EDWARD MARSHAM.

THOMAS KERSLAKE.

The warrant which appeared by the return of the gaoler to the writ of *habeas corpus*, pursuant to which he appeared before the Court, and under which he was detained pursuant to a conviction, appeared to be made under the 42 Geo. III. c. 119, which had been passed to suppress certain games and lotteries, not authorized by law. By sect. 2 it was provided, that any person convicted of any of the offences therein mentioned, should be liable to pay 500*l.*, as a forfeiture, to be recovered in the Court of Exchequer, at the suit of the *Attorney-General*, and should be also liable to be punished as a rogue and vagabond. Certain powers of proceeding in such cases, were also given to justices. One main objection, which might be taken to this conviction, was, that the justices who made it, had no jurisdiction for that purpose. By the 46 Geo. III. c. 148, s. 59, it was provided, "That all pecuniary penalties for any offence against any law, touching or concerning lotteries, or against this Act, except where it is herein otherwise directed, shall, when recovered, go, and be applied to the use of his Majesty, his heirs or successors, and from and after the commencement of this Act, it shall not be lawful for any person or persons whatever, except where it is herein otherwise directed, to commence or enter into, or cause or procure to be commenced or entered, or filed, or prosecuted, any action, suit, bill, plaint, or *information, for the recovery of any pecuniary penalty or penalties inflicted by any of the laws touching or concerning lotteries, or by this Act, unless the same be commenced, entered, filed, and prosecuted, in the name of his Majesty's *Attorney-General*, in the Court of Exchequer, at Westminster, if such offence shall be committed in England, or in the name of his Majesty's *Attorney-General* in the Court of Exchequer, in Dublin, if such offence shall be committed in Ireland, or in the name of his Majesty's *Advocate-General* in the Court of Exchequer, in Scotland, if such offence shall be committed in Scotland; and if any action, suit, bill, plaint, or information, shall be commenced or entered in any other person's name or names, than is as before

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mentioned, the same, and all proceedings, thereupon had, are hereby declared to be null and void, and the said Court or Courts, where such proceedings shall be so commenced, shall cause the same to be staid, any law, custom, or usage, to the contrary notwithstanding." There could be no doubt that the present case came within the meaning of that Act, as it appeared upon the face of the committal, that the defendant had been convicted in respect of a certain game of lottery, to be determined by the chance of drawing certain tickets, on which tickets, certain numbers in figures were then and there marked and impressed, and on the drawing of any one of which said tickets, the said Henry Tuddenham then and there undertook, in consideration of a certain sum of money, to wit, the sum of 1s. to him paid, on demand, by the drawer of the same, to deliver certain goods to such drawer of such ticket. It, therefore, appeared, that the justices making the conviction, had no jurisdiction to make it, as being for a pecuniary penalty. The proceeding, consequently, ought to have been taken by the authority of the *Attorney-General*. No such authority was, however, here shown.

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Palmer and *O'Malley* opposed the discharge of the defendant, and contended, that the Legislature never could have intended that proceedings, such as those, which had *been instituted by the informant, in the present case, should be carried on, either in the name of the *Attorney-General*, or by his consent. * * *

[*941]

Cur. adv. vult.

WIGHTMAN, J. :

This was a case before me, in which Henry Tuddenham, who was brought up by *habeas corpus*, appeared by the return, to have been committed to the gaoler of the House of Correction, at Little Walsingham, under a commitment for an offence under the statute 42 Geo. III. c. 119, passed for suppressing certain games and lotteries, not authorized by law. There were several objections *taken to the commitment, one of which is decisive, so that it becomes unnecessary for me to decide the others. The objection in question was, that since the statute 46 Geo. III. c. 148, such a proceeding as the present before magistrates cannot be sustained, when by the 59th section of that Act, it is directed that proceedings for all penalties concerning lotteries, shall be in the name of the *Attorney-General*; and if proceedings are commenced in any other person's name, they are "declared to be null and void, and the said

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Court or Courts, where such proceedings shall be so commenced, shall cause the same to be staid: any law, custom, or usage to the contrary notwithstanding." Now, that clause relates to "all pecuniary penalties for any offence against any law touching or concerning lotteries, or against that Act." According to those words, there can be no doubt that this case would be included, for on the face of this commitment, the offence is described as "a certain game of lottery, and to be determined by the chance of drawing certain tickets, on which tickets certain numbers in figures, were then and there marked and impressed, and on the drawing of any one of which said tickets, the said Henry Tuddenham then and there undertook, in consideration of a certain sum of money, to wit, the sum of 1s. to him paid on demand, by the drawer of the same, to deliver certain goods to such drawer of such ticket." In answer to this objection, which was taken on the prisoner being brought up, but which was not mentioned when the *habeas corpus* was moved for, the case of *R. v. Liston* (1) was referred to; but, if it had not been for that case, I should have thought the objection decisive. Now, that decision is, I confess, an extraordinary one to my mind. It was on a conviction removed by a *certiorari*, into this Court, and which had been made on the statute, 12 Geo. II. c. 28, passed for preventing excessive and deceitful gaming. One objection there made was, that the statute, 12 Geo. II. c. 28, referred to the statute, 10 & 11 Will. III. c. 117, which was *an Act for suppressing lotteries, and declared certain games within that Act to be lotteries. Then, the statute, 27 Geo. III. c. 1, was mentioned, by which the jurisdiction of magistrates was taken away in express terms, to convict for penalties incurred for offences concerning lotteries. The judgment of the Court is thus expressed. "There is no pretence for either of the objections: the first, (the one which I have referred to) has been already overruled in a case which came before us two years ago. The lotteries meant by the 27 Geo. III. c. 1, are State lotteries only." The case there referred to, appears not to be reported any where. Now, on reference to the statute, 27 Geo. III. c. 1, in section 1, certain Acts are recited, the first of which appears, amongst other things, to be for suppressing illegal lotteries; and section 2 takes away the jurisdiction of magistrates, and directs the mode to be followed for recovering penalties "which shall be incurred by any person or persons offending against such parts of the said Acts, or any of them, as touch and concern lotteries."

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The case of *R. v. Liston*, seems to decide that those words refer to State lotteries only, and yet one statute is recited, which refers to illegal lotteries generally. The statute, 8 Geo. I. c. 2, is one recited, which is, amongst other things, “for suppressing lotteries, denominated sales and other private lotteries.” That statute, therefore, expressly applies to illegal lotteries generally, and to penalties inflicted as to them. It is true, the words of the 2nd section of the 27 Geo. III. c. 1, are “as touch and concern lotteries,” and no doubt the language of the Court, in the case of *R. v. Liston* is very express that that clause applies to State lotteries only, but the Court there decided on a previous decision which is not reported, and so we cannot now say what may have been the precise ground on which that previous case was decided. However, in the present case, the language of the statute, 46 Geo. III. c. 148, s. 59, is very different from that of the 27 Geo. III. c. 1, s. 2. The language is, that it shall not be lawful for any person to commence proceedings “for the recovery of any pecuniary *penalty or penalties inflicted by any of the laws touching or concerning lotteries, or by this Act,” unless commenced in the name of the *Attorney-General*, in the Court of Exchequer. Now, both the statutes, 42 Geo. III. c. 119, and 46 Geo. III. c. 148, have been passed since the decision of the case of *R. v. Liston*. Therefore, whether the Court would now arrive at the same conclusion on those statutes is another question. By the 7th section also of the 42 Geo. III. c. 119, all the provisions, powers, &c., of the 27 Geo. III. c. 1, are extended to this very statute, 42 Geo. III. c. 119, therefore, even if it were not on account of the 46 Geo. III. c. 148, the present commitment would be bad, as the provisions of the 27 Geo. III. c. 1, expressly takes away the jurisdiction of magistrates. The magistrates, therefore, I think, could not make this commitment. Proceedings for penalties under the 42 Geo. III. c. 119, having, certainly by the statute, 46 Geo. III. c. 148, s. 59, been restricted to be taken in the name of the *Attorney-General*, in the Court of Exchequer. That section, I think, applies to the offence in question, and that since the passing of it, such a proceeding as the present cannot be taken by a common informer. Practically also, I believe, it is usual that the proceedings should be taken in the name of the *Attorney-General*, in the Court of Exchequer. The prisoner must, therefore, be discharged. It is unnecessary, that I should decide the other objections.

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T. TUDDENHAM.

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Prisoner discharged.

1841.

[993]

IVE *v.* SCOTT AND ANOTHER (1).

(9 Dowling, Pr. Cas. 993—994.)

The day on which it was alleged the plaintiff was ejected by the defendant, and that when possession was recovered by the former, are not material in a declaration in trespass for mesne profits, although they are not stated under a *videlicet*.

KNOWLES applied for a rule to show cause why the execution of the writ of inquiry, in this case, should not be set aside, and a new writ issued. It was an action of trespass for mesne profits, and, in the declaration, it was alleged that the defendant, on a certain day mentioned, but not stated under a *videlicet*, broke and entered the premises, &c., and ejected the plaintiff, and kept him out until a certain other day also mentioned, but not stated under a *videlicet*. The plaintiff proved costs to have been incurred in the action of ejectment, to the amount of 134*l.* 10*s.* No evidence, however, was produced, showing that the defendant had been actually in possession, during the period alleged to the declaration which was about three years. The under-sheriff told the jury, that the plaintiff was only entitled to recover nominal damages for the issues and profits, beyond the amount of costs proved. According to this direction, the jury found a verdict. It was now submitted, that this direction of the under-sheriff was wrong, as the defendant, by suffering judgment by default, had admitted himself to be in possession during the period alleged in the declaration. If the time had been laid under a *videlicet*, this might not have been so, but not having been so alleged, suffering judgment *by default, operated as an admission, that the defendant had been in possession during the alleged period.

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WIGHTMAN, J. :

If the day alleged in the declaration is material, suffering judgment by default is an admission that the defendant was in possession during the time alleged. In order, however, to render it material, the plaintiff must contend that if he had failed in proving the day alleged, he would have failed altogether. I am quite certain that it is not material, and, therefore, the defendant, in suffering judgment by default, had not made the admission suggested. It appears to me, therefore, that the direction of the under-sheriff was correct. There must, consequently, be no rule.

Rule refused.

REG. v. SNEYD AND ANOTHER.

1841.

(9 Dowling, Pr. Cas. 1001—1007; S. C. 5 Jur. 962.)

[1001]

Where justices met in Petty Sessions to appoint overseers, in due time, after the 25th of March, pursuant to the 54 Geo. III. c. 91 (1), and, in consequence of a difficulty with respect to certain appointments, they adjourned the consideration of those appointments to a day more than fourteen days from the 25th of March, an appointment made with respect to them on such day of adjournment was held good, as the Sessions had become possessed of the subject-matter: and other appointments made for the same township by other justices, within fourteen days after the 25th March, invalid.

CRESSWELL and Godson showed cause against a rule nisi, obtained by V. Lee, calling on the defendants, who were justices of the county of Stafford, to show cause why a writ of *certiorari* should not be granted to bring up an order for the appointment of certain overseers for the township of Onecot, in the city of Stafford. The facts of the case appeared to be, that regular notices having been given that a Petty Sessions would be held for the appointment of overseers for the district in which Onecot was situated, on the 31st March, certain justices assembled, and having appointed twenty or thirty overseers, some questions arose as to the fitness of certain persons in the township to act as overseers: they then adjourned the question until the 14th of April. One of the justices, who was present on this occasion, imagining that this adjournment was not good, *and, as the 14th April was more than fourteen days from the 25th March, within which time, pursuant to the provisions 54 Geo. III. c. 91, the appointment of overseers must take place, he proceeded to a place called Frog Hall, and the next day, the 1st of April, appointed two overseers for the township of Onecot. Pursuant to the adjournment of the 14th April, certain justices assembled and made an appointment of overseers for the township of Onecot. The object of the present application was, to remove the second appointment into this Court, in order to quash it, on the ground that having been made subsequent to the appointment of the 1st of April, it was invalid. It was submitted, however, that the second appointment was valid, and the first invalid. On the 31st March, the justices having assembled for the purpose of appointing overseers for this township among others, and finding some difficulty with respect to this particular appointment, as to the persons within the township who were fitted to hold the office of overseer, they adjourned the question. In so doing,

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they had possessed themselves of the matter, their jurisdiction attached, and, therefore, it was competent for them to adjourn it in the manner stated. Having adjourned it, it was not competent for any other justice to interfere, to make an appointment of overseers. The appointment, of the 1st April, was, consequently, a mere nullity. [They cited *Rex v. Sainsbury* (1).]

[1004]

V. Lee and *Whitmore* supported the rule, and contended that the priority of the appointment on the 1st April, rendered that the valid appointment; and that it was incompetent for the justices before whom the matter had already been, to proceed to make an appointment on the 14th. With respect to *R. v. Sainsbury*, cited on the other side, it did not affect the question, because, in that case, an actual decision had been pronounced by the magistrates, before whom the matter had come. [They cited *R. v. The Inhabitants of Great Marlow* (2) and *R. v. The Overseers of Bridgewater* (3).]

[1005]

COLERIDGE, J. :

One question in this case, is, whether the appointment of the 14th of April was a valid appointment? I think I am bound to decide that question first. It may be urged that the first appointment being made, the second is made out of time. I do not think that proposition can be sustained; although the appointment is required to be made by the 54 Geo. III. c. 91, within fourteen days after the 25th of March, yet the general rule is, that where such a provision is introduced, unless there are negative words in the statute, providing that the appointment shall not take place afterwards, such a provision *is to be taken as directory. That was the construction put upon the 43 Eliz. and writs of *mandamus* have been issued, requiring magistrates to make appointments of overseers, the issue of which writs must have proceeded on the ground that the words of the statute were directory. No negative words are introduced into this statute, therefore, its language must be regarded merely as directory. I cannot but think, that, if the magistrates had heedlessly and thoughtlessly allowed the time for appointing overseers, as limited by the Act of Parliament to pass, and had proceeded to the appointment on the 14th of April, it would have been a perfectly valid appointment. The question then is, whether, the appointment of the 1st of April is a valid

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(1) 2 R. R. 433 (4 T. R. 451).

(2) 6 R. R. 420 (2 East, 244).

(3) 1 Cowper, 139.

one? Now, I do not think that the appointment made first in point of time is necessarily valid in point of law. The magistrates have met pursuant to notice. They make various appointments. They differ as to this, and four or five others. By the consent of all present, and among others of Mr. Sneyd, the matter is adjourned until the 14th of April. That being done, I think they had obtained possession of the subject-matter, and, therefore, had jurisdiction over it. Suppose, that on the 31st of March, they had adjourned to any day within the fourteen days after the 25th of March, would it have been competent for any two magistrates to go during that time, and make another appointment of overseers? I think not. I think that is precisely the same when you get over the difficulty of the question as to the adjournment, whether the adjournment was within the fourteen days or not. Upon its being made known to Mr. Sneyd, that the adjournment for such a length of time might be irregular, the proper course for him to pursue would have been to inform his brother magistrates of the fact, and proceed or not with the appointment of overseers, in any way they thought proper; but without doing so, he goes to another place, and without the knowledge of his brother magistrates, assists in making the *appointment on the 1st of April. He had no right to do that. As I hold the appointment on the 14th to have been valid, the appointment of the 1st of April was irregular. I think, therefore, that the present rule ought to be discharged, but without costs.

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Rule discharged without costs.

IN THE MATTER OF ARBITRATION BETWEEN TANDY AND
TANDY.

1841.

[1044]

(9 Dowling, Pr. Cas. 1044—1048; S. C. 5 Jur. 726.)

An arbitrator on a reference with respect to the right to a certain house and premises, directed certain conveyances to be executed by one party to the other, and awarded, that in case of any dispute arising with respect to the form of those conveyances, those disputes should be settled by such counsel or solicitor as he should appoint. The Court set aside the award, on the ground that the arbitrator, by reserving a future power to himself to delegate the authority to determine disputes between the parties, had exceeded his authority, and that this direction could not be separated from the rest of the award.

V. *LEE* showed cause against a rule for setting aside an award, on the grounds, amongst others, of an excess of authority and want

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TANDY.

of finality, with respect to the mode in which certain possible disputes as to conveyances, &c. should be settled. The submission was between John Tandy the younger, John Tandy the elder, and Charles Tandy. The date of the submission was the 22nd August, 1840. It recited that John Tandy the younger claimed to be heir-at-law to his late brother, William Tandy, and, as such heir, to be entitled to the possession, or to receive the rents and profits for his own use, of the "Bell Inn," at Rouse Leuch, in the county of Worcester; and that John Tandy the elder, as mortgagee of the premises, claimed title thereunto, in respect of a sum of 100*l.* and interest, originally charged on them by John Alland, and which John Tandy the elder had paid off; and that Charles Tandy, as administrator of William Tandy, alleged that, should it be found that John Tandy the younger, as such heir-at-law as aforesaid, was legally entitled to the possession of the "Bell Inn," he would be deemed in equity either as a trustee for and on behalf of the creditors and the persons entitled to the assets of the deceased, under the statute for the distribution of intestate effects; that a writ had been sued out of the Court of Exchequer, by John Tandy the younger, against John Tandy the elder: and that, after issue joined and notice of trial given at two different times, the record was withdrawn, by reason whereof the said John Tandy the elder had since obtained judgment as in case of a nonsuit, and was entitled to the costs relating to such judgment, to be taxed by the proper officer, which costs, when taxed, were to be considered as an undisputed item, to be brought into account between the parties; and that divers other claims, demands, and differences had arisen, and were pending between the parties; that it *was then agreed to refer all matters in difference to arbitration, and the parties agreed to execute all such conveyances, releases, and assurances as the arbitrator should direct. The costs of the reference and award were to be in the discretion of the arbitrator. The arbitrator having entered on the reference, made his award on the 9th November, 1840. It awarded, "That John Tandy the younger is, as he claims, heir-at-law to his late brother William Tandy; that the said John Tandy the elder is, as he claims, entitled to the sum of 100*l.*, and 46*l.* 5*s.* for interest thereon; also, that the said John Tandy the elder, and Charles Tandy, are indebted to the said John Tandy the younger, in the sum of 184*l.* 15*s.* 7*d.*" It then ordered that the sum of 38*l.* 10*s.* 7*d.* should be paid by John Tandy the elder and Charles Tandy to John Tandy the younger, on the

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TANDY.

23rd of December, "such sum to be taken and considered in liquidation of all claims and demands either of the parties to the said recited agreement may have upon the other or others of them, either as mortgagee, administrator, or otherwise howsoever." It then directed that John Tandy the elder and Charles Tandy should deliver an abstract of all deeds in their possession relating to the "Bell Inn"; "and shall, on the said 23rd day of December next, execute all such conveyances, releases, and assurances, as may be necessary for conveying, releasing, or otherwise assuring unto the said John Tandy the younger, his heirs and assigns, or as he shall appoint and direct, all the estate, right, and interest of them, the said John Tandy the elder, and Charles Tandy, or either of them, of and to the said messuage or inn and premises, situate at Rouse Leuch aforesaid, called the 'Bell Inn,' with the appurtenances freed and discharged from the said mortgage debt or sum of 100*l.* and interest, and from all other incumbrances made or committed by the said John Tandy the elder, and Charles Tandy, or either of them. And in case of any dispute as to what conveyances, releases, or assurances shall be necessary for that purpose, or as to *any of the clauses, covenants, or provisoes to be contained therein, shall arise, the same shall be settled and approved between the said parties by such counsel or solicitor as I shall appoint." It then ordered, "That the costs should be equally borne by each party." And, lastly, "That upon payment of the sum of 38*l.* 10*s.* 7*d.*, and execution of such conveyances, releases, and assurances as aforesaid, the said John Tandy the younger, and John Tandy the elder, and Charles Tandy shall, at the costs of the party requiring the same, sign, seal, and execute mutual agreements and releases to each other of all controversies, actions, suits, accounts, judgments, and demands whatsoever, from the beginning of the world to the day of the date of the said obligation." In the rule to set aside the award, the material objections were, "That the arbitrator, in directing as to the execution of conveyances, releases, and assurances, that in case any disputes as to what conveyances, releases, or assurances shall be necessary, or as to any of the clauses, covenants, or provisoes to be contained therein, shall arise, the same shall be settled and approved between the said parties by such counsel or solicitor as he, the said arbitrator, shall appoint; and in ordering all further costs to be incurred in settling any conveyances, releases, or assurances, in case of dispute as aforesaid, to be paid as in the said award is expressed, has

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TANDY.

exceeded his authority ; and that the said award is not final in that respect." *Lee* submitted, that in reading the award, with a view to sustain it, no defects, such as those pointed out in the rule, could be considered as existing. If, however, the Court thought that an excess of jurisdiction had been exercised by the arbitrator, it might be discarded, and the remainder of the award would be good. He cited *Addison v. Gray* (1), *Winter v. Lethbridge* (2), *Dodd. Williams v. Richardson* (3), *Aitcheson v. Cargey* (4).

[1047]

W. J. Alexander and White, in support of the rule, contended that the arbitrator, by not determining completely, when he published his award, what was to be done ultimately by the parties, had left his award defective, for want of finality ; and by reserving to himself a power to appoint a counsel or solicitor, if future differences arose between the parties, he was exercising a power which the submission to arbitration had clearly not conferred on him. Having thus made an award which was not final, and exceeded his jurisdiction, the present rule must be made absolute. They cited *Manser v. Heaver* (5), *Thinne v. Rigby* (6), *Ross v. Clifton* (7).

COLERIDGE, J. :

I think that there is one objection which is fatal to this award. It is certain that, if an arbitrator exceeds his authority, it will make the award bad ; but if the matter in which he exceeds his authority can be separated, so as to leave the rest of the award untouched, the remainder of the award may stand good. If, however, the excess of authority overrides the whole of the award, it cannot be sustained. In this case, there has been an excess of authority, which affects the very substance of the award ; and, therefore, it cannot be said that he has properly decided the matters referred to him. The arbitrator has made a reservation to himself of a contingent power to appoint a counsel hereafter, to decide as to what shall be the proper conveyances, releases, &c. to be executed between the parties, and as to the clauses and covenants which they are to contain. Now, it is settled, that if an arbitrator does not decide the matter referred to him, at the time he makes his

(1) 2 Wils. 293.

(2) 28 R. R. 709 (M'Clel. 253 ; 13 Price, 533).

(3) 21 R. R. 513 (8 Taunt. 697).

(4) 26 R. R. 305 (in error, 2 Bing.

199 ; 9 Moore, 381).

(5) 37 R. R. 426 (3 B. & Ad. 293).

(6) Cro. Jac. 314.

(7) P. 816, above.

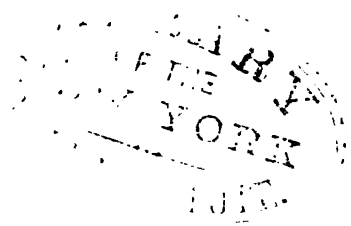
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award, but reserves to himself a future power to act when his power is gone, that it is an excess of authority, as he cannot, in that way, keep alive his authority; nor can he, I think, delegate it, as he attempts to do here. In this case, the question in dispute is as to the title *of the "Bell Inn": on the one hand, there is a claim of John Tandy the younger, as heir-at-law of his brother: on the other, there is the claim of John Tandy the elder, as assignee of a mortgagee; and again, there is the claim of Charles Tandy, as administrator. Then, the very question in dispute is, whether John Tandy the younger is entitled, as heir-at-law, to have the "Bell Inn" conveyed to him? I will assume that the arbitrator has properly decided that he is heir-at-law, and that the title to have a conveyance of the "Bell Inn" has been decided; but then the arbitrator only awards, that on the day when the money is to be paid, John Tandy the elder, and Charles Tandy shall execute all such conveyances, &c. as may be necessary for the conveyance and assurance to John Tandy the younger, of the "Bell Inn." But the manner in which the conveyance is to be effected is left in doubt, the arbitrator only saying that he will, at a future time, decide upon a person who shall settle it. Thus the very question in dispute, as to the right to have possession of the "Bell Inn," is left undecided; and I think that that is a question which so affects the award that the whole is bad.

Rule absolute.





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